95

Supreme Court, U.S.
FILED
JUN - 9 2008
OFFICE OF THE CLERK

No. 07-1544

In The
# Supreme Court of the United States

**SUSAN TKACHIK.**
*Petitioner,*
v.

**COMERICA, INCORPORATED; STANDARD FEDERAL BANK; FRANK MANDEVILLE,**
*Respondents.*

## Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

## PETITION FOR A WRIT OF CERTIORARI
with Appendix

*Charles M. Penzien
PENZIEN HIRZEL, PLLC
17001 19 Mile Road
Suite 1B
Clinton Township, MI 48038

586-464-1900

Attorneys for Petitioner

*Counsel of Record*

June, 2008

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

## QUESTIONS PRESENTED

1. DOES FEDERAL LAW RECOGNIZE THAT THE EQUITABLE DOCTRINE OF SUBSTANTIAL COMPLIANCE APPLIES TO ERISA, 29 U.S.C. 1001, *et seq.*, AS A WHOLE OR JUST 29 U.S.C. §1133? IF THE SUBSTANTIAL COMPLIANCE DOCTRINE APPLIES TO ERISA AS A WHOLE, SHOULD THE FEDERAL COMMON LAW TEST FOR APPLYING THE DOCTRINE THAT HAS BEEN USED BY EVERY FEDERAL COURT TO CONSIDER THE ISSUE?

2. SHOULD FRANK MANDEVILLE BE CONSIDERED A SURVIVING SPOUSE FOR THE PURPOSES OF ERISA, 29 U.S.C. 1001, *et ceq.*, WHEN HE IS NOT RECOGNIZED AS A "SURVIVING SPOUSE" UNDER MICHIGAN LAW DUE TO THE FACT THAT HE ABANDONED JANET MANDEVILLE FOR THE EIGHTEEN MONTHS PRIOR TO HER DEATH?

3. IF AN ERISA PLAN PARTICIPANT ELECTS TO CHANGE A BENEFICIARY DUE TO SPOUSAL ABANDONMENT UNDER 29 U.S.C. §1055 AND 26 CFR §1.401(a)(20), AND DIES PRIOR TO ESTABLISHING THE SPOUSAL ABANDONMENT TO THE "SATISFACTION OF THE PLAN REPRESENTATIVE", CAN A STATE COURT ORDER FINDING THAT AN ABANDONING

SPOUSE WAS UNLOCATEABLE BE USED TO ESTABLISH SPOUSAL ABANDONMENT?

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Sixth Circuit.

The Petitioner here and appellant below is Susan Tkachik.

The Respondents here and appellees below are Comerica Incorporated, Standard Federal Bank, N.A. n/k/a LaSalle Bank Midwest, N.A. n/k/a Bank of America, N.A., and Frank Mandeville.

## CORPORATE DISCLOSURE STATEMENT

Petitioner is a private individual and is not a nongovernmental corporation thus no Corporate Disclosure Statement is required under Rule 29.6.

## TABLE OF CONTENTS

Questions Presented ..... i

Parties to the Proceeding ..... iii

Corporate Disclosure Statement ..... iv

Table of Contents ..... v

Table of Authorities ..... xii

Statement of Jurisdiction ..... 1

Statutes and Regulations Involved ..... 1

Statement of the Case ..... 2

Statement of Facts ..... 3

Reasons for Granting of the Petition ..... 15

I. THE TRIAL COURT AND THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT JANET MANDEVILLE SUBSTANTIALLY COMPLIED WITH THE ERISA REQUIREMENTS TO CHANGE

HER BENEFICIARY TO SUSAN TKACHIK WHEN THE EVIDENCE DEMONSTRATED THAT SHE CLEARLY INTENDED TO CHANGE THE BENEFICIARY AND TOOK ALL ACTIONS SHE POSSIBLY COULD TO EFFECUTATE THE CHANGE WHILE SHE WAS HOSPITALIZED PRIOR TO HER DEATH. ..... 15

A. The trial court and thereafter the Sixth Circuit Court of Appeals erred in determining that the equitable doctrine of "Substantial Compliance" is only applicable to 29 U.S.C. §1133, as all other Courts to consider the issue have indicated that the substantial compliance doctrine is applicable to the entire ERISA statutory scheme. ..... 16

B. In the alternative, assuming the lower courts were free to formulate a common law definition of "surviving spouse" under ERISA, they erred in failing to make the distinction between a "spouse" and a "surviving spouse" as the tern. "spouse" and "surviving spouse" have different meanings under the common law and state law, which should be incorporated into a "federal common law" definition of a surviving spouse. . . . . 23

C. Both the trial and appeals court in this matter failed to appreciate or consider the fact that there were questions of fact regarding the employer's receipt of the change of beneficiary forms prior

to Janet Mandeville's death and their failure to object to those forms or request additional information. ..... 34

II. FRANK MANDEVILLE IS NOT THE "SURVIVING SPOUSE" OF JANET MANDEVILLE FOR THE PURPOSES OF ERISA, 29 U.S.C. 1001, *et seq.*, BECAUSE HE ABANDONED JANET MANDEVILLE FOR EIGHTEEN MONTHS PRIOR TO HER DEATH AND WAS DEEMED NOT TO HAVE "SURVIVING SPOUSE" STATUS UNDER MICHIGAN LAW. ..... 38

A. The trial court and thereafter the Sixth Circuit Court of Appeals erred in using "Federal Common Law" to define the martial

relationship of Frank and Janet Mandeville as the definition of martial relations is exclusively within the realm of state law and both courts should have adopted Michigan's definition of a surviving spouse as was required by the Tenth Amendment of the United States Constitution. ..... 39

B. In the alternative, assuming the lower courts were free to formulate a common law definition of "surviving spouse" under ERISA, they erred in failing to make the distinction between a "spouse" and a "surviving spouse" as the term "spouse" and "surviving spouse" have different meanings under the common law and state law, which should be incorporated into a

"federal common law" definition of a surviving spouse. . . . . 49

III. ASSUMING ARGUENDO THAT FRANK MANDEVILLE IS JANET MANDEVILLE'S SURVIVING SPOUSE FOR THE PURPOSES OF ERISA, THE LOWER COURTS ERRED IN DETERMINING THAT JANET MANDEVILLE DID NOT ELECT TO CHANGE THE BENEFICIARY OF HER ERISA PLANS DURING HER LIFETIME AND THAT FRANK MANDEVILLE'S CONSENT WAS REQUIRED. . . . . 61

A. The lower courts erred in determining that Janet Mandeville did not elect to change the beneficiary of her ERISA plans during her lifetime when Janet

**Mandeville wrote letters from her hospital bed to Comerica and Standard Federal Bank on June 28, 2002 prior to her death on July 13, 2002 and by imposing a requirement that Janet Mandeville demonstrate that Frank Mandeville had abandoned her within the meaning of 29 U.S.C. §1055 and 26 CFR §1.401(a)(20), when the plain language of these rules and regulations do not impose such a requirement. ..... 61**

Conclusion and Relief Requested ..... 71

## TABLE OF AUTHORITIES

### Cases

*Aetna Life Ins. Co v. Weatherford*,
1991 WL 1161 (6th Cir. 1991) ..... 19, 22, 23, 25

*Bankamerica Pension Plan v. McMath*,
206 F.3d 821 (9th Cir. 2000) ..... 20

*Bob Jones University v. U.S.*,
461 U.S. 574 (1983) ..... 58

*Bond v. Trustees STA-ILA Pension Fund*,
902 F. Supp. 650 (D. Md. 1995) ..... 43

*Chapman v. Higbee, Co.*,
319 F.3d 825 (6th Cir. 2003) ..... 48

*Chan v. Bell*, 464 F. Supp.
125 (D.C.D.C. 1978) ..... 42, 43

*Connecticut Gen. Life Ins. Co. v.*
*Thomas*, 910 F. Supp. 297
(S.D. Tex. 1995) ..... 20

*Davis v. Combes*,
294 F.3d 931 (7th Cir. 2002) ..... 20

*DamilerChrysler Corp. v. Durden*,
448 F.3d 918 (6th Cir. 2006) ..... 22

*Egelhoff v. Egelhoff*,
532 U.S. 141 (2001) ..... 55

*Ellis Nat. Bank of Jacksonville v. Irving Trust Co.*, 786 F.2d 466
(2nd Cir. 1986) ..... 59

*Ex Parte Quirin*,
317 U.S. 1 (1942) ..... 46

*Harpole v. Entergy Arkansas, Inc.*,
197 F. Supp. 2d 1152 (E.D. Ark. 2002) ..... 21

*Hisquierdo v. Hisquierdo*,
439 U.S. 572 (1979) ..... 41

*Hooper v. People of State of Cal.*,
155 U.S. 648 (1895) ..... 44

*I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) ..... 44

*Liberty Life Assur. Co. of Boston v. Kennedy*,
358 F.3d 1294 (11th Cir. 2004) ..... 20

*Martz v. Kurtz*, 907 F.
Supp. 848 (M.D.Pa. 1995) ..... 59

*McMillan v. Parrott*,
913 F.2d 310 (6th Cir. 1990) ..... 52, 54

*Metropolitan Life Ins. Co. v. Kubichek*, 83 F. Appx. 425 (3rd Cir. 2000) ..... 19

*Metropolitan Life Ins. Co. v. Johnson*, 297 F.3d 558 (7th Cir. 2002) ..... 20

*Metropolitan Life Ins. Co. v. Mass.*, 417 U.S. 724 (1985) ..... 43

*Mounce v. Mounce*, 921 F. Supp. 712 (N.D.Ok. 1996) ..... 21

*Pennoyer v. Neff*, 95 U.S. 714 (1878) ..... 41

*Phoenix Mut. Life ins. Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994) ..... 17, 20-22, 25, 29

*Prudential Ins. Co. of America v. Schmid*, 337 F.Supp. 2d 325 (D. Mass. 2004) ..... 20

*Regions Hosp. v. Shalala*, 522 U.S. 448 (1998) ..... 51

*Rowland v. California Men's Colony*, 506 U.S. 194 (1993) ..... 51

*Smith v. Allstate Ins. Co.*, 403 F.3d 401 (6th Cir. 2005) ..... 51, 63

*Sosna v. Iowa*, 419 U.S. 393 (1975) ..... 41

*Steamship Trade Ass'n Intern. Longshoremen's Ass'n v. Bowman*, 247 F.3d 181 (4th Cir. 2001) ..... 20

*U.S. v. Yazell*, 382 U.S. 341 (1966) ..... 41

*Water Quality Ass'n Employees' Benefit Corp. v. U.S.*, 795 F.2d 1303 (7th Cir. 1986) ..... 48, 64

**Constitutions**

U.S. Const. amend. X ..... 47

**Dictionaries**

Black's Law Dictionary (Abridged 7th ed. 2000) ..... 53, 66, 67

**Federal Regulations**

26 C.F.R. §1.401-a(20) (2007) ..... 62, 68

**Federal Statutes**

28 USC § 2107 (2007) ..... 3

29 USC § 1001 (2007) ..... 1, 38, 40, 46, 59

29 USC § 1055 (2007) ..... *passim*

29 USC § 1132 (2007) ..... 70

29 USC § 1133 (2007) ..... 16, 17, 18

**State Statutes**

Connecticut
Conn. Gen. Stat. Ann. § 45a-436 (2007) ..... 56

Indiana
Ind. Code Ann. § 29-1-2-15 (2007) ..... 56

Kentucky
Ky. Rev. Stat. Ann. § 392.090 (2007) ..... 56

Massachusetts
Mass. Gen. Laws Ann. Ch. 209 § 36 (2007) .... 56

Michigan
Mich. Comp. Laws Ann. § 700.1101
(West 2007) ..... 49

Mich. Comp. Laws Ann. § 700.2801
(West 2007) ..... 44, 47-49, 56

Missouri
Mo. Ann. Stat. §474.140 (2007) ..... 56

New Hampshire
N.H. Rev. Stat. §560:18 (2007) ..... 56

New Jersey
N.J. Stat. Ann. § 3B:8-1 (2007) ..... 56

New York
McKinney's EPTL § 5-1.2 (2007) ..... 56

North Carolina
N.C. Gen. Stat. Ann. §31A-1 (2007) ..... 56

Oregon
Or. Rev. Stat. § 114.135(2007) ..... 56

Pennsylvania
20 Pa. Cons. Stat. Ann. §2106 (2007) ..... 56

Virginia
Va. Code Ann. §64.1-16.3 (2007) ..... 56

**Secondary Sources**

1 W. Blackstone, *Commentaries on the Laws of England* (1765) ..... 57

## Statement of Jurisdiction

The Court of Appeals for the Sixth Circuit issued its opinion on March 11, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## Statutes and Regulations Involved

This case involves provisions of the Employment Retirement Income Security Act, 29 U.S.C. § 1001, *et seq*. The pertinent provisions are reproduced at Pet. App. At A1 – Q1.

## Statement of the Case

This case was originally instituted on or about July 8, 2005, by Susan Tkachik, the sister of the deceased plan participant against Comerica Incorporated and Standard Federal Bank, N.A. n/k/a LaSalle Bank Midwest, N.A. Standard Federal is now known as Bank of America. Subsequently, on or about October 13, 2005, Susan Tkachik filed an amended complaint naming Frank Mandeville as a defendant. On December 18, 2006, the district court heard oral argument on Comerica's Motion for Interpleader; Defendant Standard Federal's Motion to Dismiss, Frank Mandeville's Motion for Summary Judgment, and Susan Tkachik Motion for Summary Judgment. On or about December 26, 2006, the trial court entered an order granting Frank Mandeville's

Motion for Summary Judgment; Denying Susan Tkachik's Motion for Summary Judgment; Denying Standard Federal's Motion to Dismiss; Mooting Comerica's Motion for Interpleader; and Denying Comerica's Motion for award of reasonable attorney's fees. Subsequently, on or about January 5, 2007, the trial court entered a judgment in favor of Frank Mandeville, awarding him Janet Mandeville's ERISA benefits packages. An appeal was then filed on January 24, 2007 pursuant to 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 3(a) in the Sixth Circuit Court of Appeals. That appeal was decided on March 11, 2008 with the issuance of the Court's opinion.

## Statement of Facts

Janet Mandeville was an employee of Comerica Incorporated (hereinafter "Comerica"),

from 1972 to 1994, and Standard Federal Bank, N.A. n/k/a Bank of America (hereinafter "Standard Federal"), from 1994 to 2002. Pet. App. at C2. Ms. Mandeville's employment at Comerica and Standard Federal resulted in her owning and being the beneficiary of life insurance policies, pensions, 401 K's, IRA's, insurance policies, and other profit sharing agreements (hereinafter referred to as the "benefits package") stemming from her respective periods of employment at Comerica and Standard Federal. These benefit packages were to be assignable to a named beneficiary in the event of Janet Mandeville's death. Janet Mandeville initially named her husband, Frank Mandeville, as the beneficiary of the benefit packages that she held with Defendants Comerica and Standard Federal.

Due to a deterioration in the Mandeville's marriage during the 1990's, however, Janet Mandeville changed the beneficiary of her benefits packages to her sister, Susan Tkachik. Ms. Mandeville made these changes and also prepared a comprehensive estate plan when she learned that she suffered from a sudden pulmonary embolism As found by the Macomb County Probate Court, which determined that Frank Mandeville was not the surviving spouse of Janet Mandeville, the deterioration of the marriage was due to Frank Mandeville's absence from and/or desertion of Janet Mandeville. The Probate Court's finding was predicated on the following facts:

1. Frank Mandeville had been out of the country for eighteen months prior to Janet

Mandeville's death.

2. Frank Mandeville chose to be physically absent during this time period, despite the fact the he knew Janet Mandeville was terminally ill with cancer.

3. Frank Mandeville did not maintain a residence with Janet Mandeville, but could not remember where he had lived during this time period. Pet. App. At E6-E7.

4. Frank Mandeville did not communicate with Janet Mandeville during this time period by telephone or e-mail. Pet. App. at E30-E35.

5. Frank Mandeville did not return to Michigan for Janet Mandeville's funeral. Pet. App. at E40-E41.

Knowing that she suffered from a potentially life threatening complication (i.e. blood clots), and that neither her, her sister Susan Tkachik, nor Frank Mandeville's own mother could locate Frank Mandeville Pet. App. at F2, Janet Mandeville decided to create a living trust from which her property could be distributed. Janet Mandeville executed and signed the Janet E. Mandeville Living Trust. The Janet E. Mandeville Living Trust specifically stated that, "It is my [Janet Mandeville's] specific intent to give nothing to my husband under this Trust Agreement. If I am survived by my husband, for purposes of this Trust

Agreement, he will be deemed to have predeceased me." As a result, it was quite clear that Janet Mandeville did not desire to have Frank Mandeville inherit any of her property, due to the fact that Frank Mandeville had abandoned her. In fact, it was Janet Mandeville's specific intent to provide One Hundred Percent (100%) of the trust property to her sister, Susan Tkachik, as the sole beneficiary of the trust.

On June 27, 2002, Janet Mandeville executed and signed her last will and testament. Janet Mandeville's last will and testament established that upon Janet Mandeville's death all of her property would be distributed to the Janet E. Mandeville Living Trust. Similar to the trust, Janet Mandeville's last will and testament stated, "It is my specific intent to give nothing to my

husband under this Will. If I am survived by my husband, for purposes of this Will, he will be deemed to have predeceased me."

In order to further prepare her estate plan, on June 27, 2002, Janet Mandeville executed and signed a Designation/Change of Beneficiary on Group Life Insurance form with the understanding that by executing this single form she would assign the proceeds of her Comerica benefit package to Plaintiff Tkachik. On June 28, 2002, Janet Mandeville attempted to transfer all of her assets held by Comerica from existing accounts in her name to a new account in the name of Plaintiff Tkachik as the Transfer on Death beneficiary.

On June 27, 2002, Janet Mandeville executed and signed a Standard Federal Life Insurance Beneficiary Designation and Standard

Federal Group Profit Sharing and Savings Plan Beneficiary Designation forms in which Plaintiff Tkachik was named as the primary beneficiary. On June 28, 2002, Janet Mandeville attempted to transfer all of her assets held by Standard Federal from existing accounts in her name to a new account in the name of Plaintiff Tkachik as the Transfer on Death beneficiary.

The documents prepared in connection with the efforts to change the beneficiary designation were drafted by her counsel who was also responsible for preparation of her estate plan. In fact, the documents signed by Ms. Mandeville were prepared after consultation with the banks regarding the materials needed.

After Janet Mandeville's passing, Plaintiff Tkachik contacted representatives of Defendant's

Comerica and Standard Federal and requested that Janet Mandeville's benefit packages be disbursed to her in accordance with Janet Mandeville's desire. Pet. App. at F2 – F3. Subsequently, Plaintiff Tkachik met with Sylvia Baker, the Vice President of Standard Federal Bank's Human Resource and Benefits division App. Pet. at F2 – F3. At this meeting, Ms. Baker forwarded a copy of Janet Mandeville's Will and Living Trust to Standard Federal's Chicago office App. Pet. at F3. Sylvia Baker then informed employees of Standard Federal's Chicago office that Frank Mandeville had abandoned his marriage to Janet Mandeville, and that his whereabouts were unknown in the year and a half prior to Janet Mandeville's death Pet. App. at F3. The Standard Federal employees from the Chicago office advised Plaintiff Tkachik that

Standard Federal would not transfer Janet Mandeville's benefit package until Janet Mandeville's estate was probated, and that Standard Federal would not assign the benefit package without a court order requiring them to do so Pet. App. at F3.

Despite Standard Federal's earlier assurances, on March 18, 2003, Kimberly Cook Johnson, a representative of Standard Federal, wrote to Plaintiff Tkachik's prior counsel and stated that Standard Federal planned on assigning Janet Mandeville's benefit package to Frank Mandeville. Standard Federal based this decision on the fact that Frank Mandeville did not properly waive his original beneficiary status in writing. Plaintiff Tkachik's prior council failed to inform her of Standard Federal's change of position, while also

failing to follow Standard Federal's administrative appeal procedure. As a result, Plaintiff Tkachik chose to seek new counsel. Plaintiff Tkachik only became aware of Standard Federal's decision when her current counsel received a copy of the earlier correspondence from Standard Federal in October of 2004.

Litigation in the Eastern District of Michigan was then commenced to determine the rightful beneficiary of Janet Mandeville's ERISA funds after Standard Federal improperly assigned Janet Mandeville's benefit package to Frank Mandeville and then refused to provide Susan Tkachik information as to how to pursue any further administrative remedy. Defendant Comerica has refused to make a decision as to the proper beneficiary and has withheld Janet

Mandeville's ERISA funds until the courts determine the rightful beneficiary.

## Reasons for Granting the Petition

**I. THE TRIAL COURT AND THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TORECOGNIZE THAT JANET MANDEVILLE SUBSTANTIALLY COMPLIED WITH THE ERISA REQUIREMENTS TO CHANGE HER BENEFICIARY TO SUSAN TKACHIK WHEN THE EVIDENCE DEMONSTRATED THAT SHE CLEARLY INTENDED TO CHANGE THE BENEFICIARY AND TOOK ALL ACTIONS SHE POSSIBLY COULD TO EFFECUTATE THE CHANGE WHILE SHE WAS HOSPITALIZED PRIOR TO HER DEATH.**

This case represents an extremely important question of Federal Law which has not been, but should be resolved by this Court, *see* S. Ct. R. 10(b), and on which the Circuit Courts of Appeal are in conflict, *see* S. Ct. R. 10(a). Specifically at issue is the application of the federal common law concept

of substantial compliance to the entire ERISA statutory scheme.

The Court should grant this writ of certiorari to resolve competing applications of this doctrine among the various circuits. The Court should use this opportunity to decide whether substantial compliance is only applicable to 29 U.S.C. §1133 as held by the trial and the Sixth Circuit Court of Appeals, or whether it is applicable to the entire ERISA statutory scheme as held by other circuits.

### A. The trial court and thereafter the Sixth Circuit Court of Appeals erred in determining that the equitable doctrine of "Substantial Compliance" is only applicable to 29 U.S.C. §1133, as all other Courts to consider the issue have indicated that the substantial compliance doctrine is applicable to the entire ERISA statutory scheme.

Assuming arguendo that Frank Mandeville was Janet Mandeville's "surviving spouse" and that Janet Mandeville did not properly elect to change her beneficiary to Susan Tkachik, it is Susan Tkachik's position that Janet Mandeville's change of beneficiary was effective under the doctrine of substantial compliance. In resolving this issue, the first error that both the trial court and the Court of Appeals made was narrowly construing the equitable doctrine of substantial compliance so that it only applies to 29 U.S.C. §1133 and not the entire ERISA statutory scheme.

The federal common law doctrine of substantial compliance was created "to give effect to an insured's intent to comply [with ERISA requirements] when that intent is evident [and actual compliance does not exist.]" *Phoenix Mut.*

*Life Ins. Co. v. Adams*, 30 F.3d 554, 565 (4th Cir. 1994). In applying this equitable doctrine, a change of beneficiary form will be recognized as valid without strict compliance with the ERISA statute, if the insured:

> (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.

*Id.* at 564.

While the trial court was correct in concluding that the Sixth Circuit has acknowledged the existence of the substantial compliance doctrine to cases involving the notice plan administrators must give to participants and beneficiaries under 29 U.S.C. §1133 it clearly erred in determining that

the substantial compliance doctrine does not apply to other areas of ERISA. While the Sixth Circuit has never adopted the doctrine of substantial compliance in relation to a change of beneficiary in a published opinion, it has done so in an unpublished opinion. *See Aetna Life Ins. Co. v. Weatherford*, 1991 WL 11611, *4 (6th Cir. 1991) (A6) (we must now determine whether Earl Weatherford substantially complied with the beneficiary change provisions...).

Moreover, the five federal circuit courts to consider the issue, the 3rd Circuit, 4th Circuit, 7th Circuit, 9th Circuit, and 11th Circuit, have determined that the federal common law substantial compliance doctrine exists and is applicable in situations dealing with change of beneficiary forms. *Metropolitan Life Ins. Co. v.*

*Kubichek*, 83 Fed. Appx. 425, 429 (3rd Cir. 2003); *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 564 (4th Cir. 1994); *Steamship Trade Ass'n Intern. Lonshoremen's Ass'n v. Bowman*, 247 F.3d 181, 185 (4th Cir. 2001); *Metropolitan Life Ins. Co. v. Johnson*, 297 F.3d 558, 567 (7th Cir. 2002); *Davis v. Combes*, 294 F.3d 931, 940 (7th Cir. 2002); *Bankamerica Pension Plan v. McMath*, 206 F.3d 821, 828 (9th Cir. 2000); *Liberty Life Assur. Co. of Boston v. Kennedy*, 358 F.3d 1295 (11th Cir. 2004). Moreover, there are also published district court cases in the 1st circuit, 5th Circuit, 8th Circuit, and 10th Circuit that have also applied the substantial compliance doctrine to change of beneficiary forms. *Prudential Ins. Co. of America v. Schmid*, 337 F. Supp. 2d 325, 330 (D. Mass. 2004); *Connecticut General Life Ins. Co. v. Thomas*, 910 F. Supp. 297,

301 (S.D. Tex. 1995); *Harpole v. Entergy Arkansas, Inc.*, 197 F. Supp. 2d 1152, 1158-1159 (E.D. Ark. 2002); *Mounce v. Mounce*, 921 F. Supp. 712, 715 (N.D. Ok. 1996).

While many of the above cited cases were presented in Appellant's Motion for Summary Judgment and the subsequent appeal, both the trial court's and the Sixth Circuit's opinion fails to acknowledge the doctrine of substantial compliance and did not apply the appropriate test set forth *Phoenix Mut. Life Ins. Co, supra.* (R. 59 Opinion & Order, pp. 11-12, JA 299-300). This is especially surprising, since every other court to consider the issue has acknowledged the existence of the doctrine as evidenced by the cases cited above. Moreover, as recognized by the trial court, "[u]niformity is a 'vital component of the ERISA

framework.' *DamilerChrysler Corporation v. Durden*, 448 F.3d 918, 928 (6th Cir. 2006)." (R. 59 Opinion & order, pg. 14, JA 302). Given the fact that it makes no sense to allow a plan administrator to substantially comply with ERISA requirements, yet disallow a beneficiary's claim under a theory of substantial compliance, the trial court should have been reversed by the Sixth Circuit as its decision creates an inconsistency in ERISA law. In short, the Sixth Circuit should have expressly adopted the test set forth in *Phoenix Mut. Life Ins. Co* and *Aetna, supra,* and should have remanded this matter for the trial court to apply the proper test of substantial compliance to this case.

Unfortunately the Sixth Circuit's failure to adopt the test in *Phoenix Mut. Life Ins. Co* and

*Aetna, supra* has resulted in a conflict among the circuits with respect to the application of the substantial compliance doctrine. While a number of other circuits have concluded that substantial compliance should be adopted with respect to change of beneficiary cases, the Sixth Circuit has failed to reach that conclusion. This Court should therefore resolve that conflict providing for the adoption of the substantial compliance doctrine to the entire ERISA statutory scheme.

**B. The courts erred in failing to separate Janet Mandeville's two distinct attempts to change the beneficiary of her Comerica and Standard Federal Beneficiary accounts in making a determination that Janet Mandeville substantially complied with ERISA requirements when changing her beneficiary.**

The trial court reasoned that even if the doctrine of substantial compliance was applicable

to this case, Janet Mandeville had "ample time to comply with the procedural requirements [of ERISA] such that the Court should not resort to the doctrine of substantial compliance...." (R. 59 Opinion & Order, pg. 12, JA 300). This determination was based solely on the fact that Janet Mandeville had submitted an undated change of beneficiary form to Appellee Comerica that was signed by Frank Mandeville, but not notarized several years earlier. In coming to this determination, the trial court erred in two very important respects. First, the court failed to realize that the issue of timing is not essential to the doctrine of substantial compliance. Second, the court utterly failed to distinguish the actions Janet Mandeville undertook to change her beneficiary with Comerica and Standard Federal.

Under the federal common law rule of substantial compliance recognized by every Federal Court to consider the issue, substantial compliance will be recognized as full compliance with ERISA when a participant:

> (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.

*Phoenix Mut. Life Ins. Co.*, 30 F.3d at 565. *See also Aetna Life Ins. Co. v. Weatherford*, 1991 WL 11611, *4 (6th Cir. 1991) (A3-A7).

The two requirements set forth in the test are ***intent*** and ***action***. No where does this test impose a requirement that the intent and action must occur within a certain time frame. Moreover,

the trial court cites no authority or even sets forth any reasoning as to why the issue of timing is the be all and end all of its half-hearted application of the substantial compliance test.

If the lower courts would have properly performed an analysis of Janet Mandeville's actions under the substantial compliance doctrine they would have started by looking at Janet Mandeville's intent. In this case, Janet Mandeville's intent to disinherit Frank Mandeville and ensure that Frank Mandeville took none of her assets, ERISA or otherwise, after abandoning her while she was seriously ill could not be any more clear. This intent is evident in Janet Mandeville's testamentary scheme where her last will and trust clearly state:

The name of my husband is:

**Frank Mandeville, Jr.**

> It is my specific intent to give nothing to my husband under this Will. If I am survived by my husband, for purposes of this Will, he will be deemed to have predeceased me.

While Janet Mandeville's will and trust demonstrate her disdain for Frank Mandeville, the letters drafted to Comerica and Standard Federal Bank on June 28, 2002 explicitly state:

> By executing this form, **it is my intention to change the Beneficiary of all the above listed accounts, plans or policies that I own any interest in to: my sister, Susan Tkachik.**
>
> I am married at this time, yet **I do not wish for my husband to receive any benefit from any of the above listed accounts**, plans or policies with Comerica.

Finally, the affidavit of Janet Mandeville's sister, Susan Tkachik, details the last wishes of Janet Mandeville. Specifically, it was Janet Mandeville's desire that "Frank Mandeville receive none of her assets upon her death." (R. 39 Plaintiff's Motion for Summary Judgment, Exhibit C, JA 386). As a result, it was quite clear that Janet Mandeville never intended for Frank Mandeville to receive even a penny of her assets after she passed away.

After determining Janet Mandeville's intent, the trial court should have then proceeded to the next part of the substantial compliance analysis to determine if Janet Mandeville attempted "to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary

provisions of the policy." *Phoenix Mut. Life Ins. Co.*, 30 F.3d at 565.

In regards to the Comerica benefits plan, the trial court should have looked at two very distinct actions of Janet Mandeville. First, Janet Mandeville attempted to change the beneficiary of her Comerica benefit's plan to Susan Tkachik by having Frank Mandeville execute a spousal waiver form. While this spousal waiver form was not notarized as required 29 U.S.C. §1055, the form in all other respects constitutes a "positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy." *Phoenix Mut. Life Ins. Co.*, 30 F.3d at 565.

While Appellees' may argue that the notarization of the form is essential to the

resolution of this case, it should be noted that the only purpose for which notarization serves is to provide a form of verification that Frank Mandeville signed the waiver. While notarization may be the easiest way to verify a signature, Frank Mandeville's signature may be verified in other ways, thus substantially complying with ERISA. As admitted in Frank Mandeville's own deposition testimony, when asked whether the signature on the waiver form belonged to him he responded, "It appears to be." Pet. App. at E54-E56. As a result, Frank Mandeville's own admission is sufficient to create an issue of fact as to the validity of the signature, which if proven by Appellant, would leave no justification for not applying the substantial compliance doctrine to the spousal waiver form.

Similarly, assuming *arguendo* that the un-notarized waiver cannot be used to demonstrate substantial compliance in regard to the Comerica Plan, the letters to Comerica and Standard Federal Bank on June 28, 2002 demonstrate substantial compliance. Specifically, these letters, which constitute action on the part of Janet Mandeville, could not be any clearer when stating:

> By executing this form, **it is my intention to change the Beneficiary of all the above listed accounts, plans or policies that I own any interest in to: my sister, Susan Tkachik.**
>
> I am married at this time, yet **I do not wish for my husband to receive any benefit from any of the above listed accounts**, plans or policies with Comerica.

The trial court recognized that Janet Mandeville was under a severe time constraint

when executing these letters, as she died due to health complications on July 13, 2002. Nonetheless, it determined that Janet Mandeville did not substantially comply because she "started the process of changing the beneficiary well over a year prior to her death." The problem with this logic is twofold. First, the un-notarized Comerica change of beneficiary form has absolutely nothing to do with the Standard Federal plans. Specifically, the trial court erred in failing to evaluate whether the June 28, 2002 letters to Standard Federal Bank were sufficient action to constitute substantial compliance.

Second, assuming *arguendo* that Comerica Change of Beneficiary Form cannot be saved by the substantial compliance doctrine, it would merely constitute a previously failed attempt to change a

beneficiary. This previously failed attempt would have no bearing on whether the June 28, 2002 letters to Comerica constitute substantial compliance as these letters are separate and distinct actions taken by Janet Mandeville. Moreover, Janet Mandeville's circumstances surrounding the undated change of beneficiary form and June 28, 2002 letter were completely different. Specifically, Frank Mandeville was still locatable when he signed the undated change of beneficiary form. However, the same cannot be said when the June 28, 2002 letter was submitted to Comerica, as demonstrated by the findings of the Macomb County Probate Court. Pet. App. at D1 – D2. Finally, the trial court failed to take into account the possibility that there may have been more than one "process of the changing the

beneficiary." ERISA places no limit on the amount of times a plan participant may change their beneficiary. As a result, it only makes sense that a previously failed attempt to change a beneficiary in no way precludes another separate and distinct attempt to change a beneficiary. As such, the lower courts should be reversed and this matter remanded for a determination as to whether the June 28, 2002 letters constituted substantial compliance under Janet Mandeville's circumstances with respect to both the Comerica and Standard Federal benefits plans.

### C. Both the trial and appeals court in this matter failed to appreciate or consider the fact that there were questions of fact regarding the employer's receipt of the change of beneficiary forms prior to Janet Mandeville's death and their failure to object to those forms or request additional information.

This Court should also grant this writ because the lower courts failed to consider or appreciate that factual issues that are at issue in this matter. Specifically, neither the trial court nor the Sixth Circuit Court of Appeals considered the factual considerations surrounding the submission of the change of beneficiary forms to both banks following their execution in late June and early July of 2002.

As stated in the fact section of this brief, Janet Mandeville decided to create a comprehensive estate plan after she was informed by her treating physicians that she had developed potentially life threatening blood clots that had appeared in her extremities and her lungs. This occurred June 2002 and she immediately went

forward with preparing an estate plan which was designed to completely disinherit her husband who she had not heard from for over a year and a half. The change of beneficiary forms at issue in this writ were executed as part of that process.

The forms at issue were thereafter immediately delivered to both Comerica and Standard Federal. Both of the letters that accompanied the forms clearly indicated to the banks that Ms. Mandeville was married and that she did not want her husband to receive any of her estate. These forms were accepted by the banks and were not rejected or questioned at that time.

In fact, the record clearly indicates that the only questions related to the execution of the forms at issue arose many months after Janet Mandeville's death when her sister Susan Tkachik

attempted to pursue the collection of the funds in the accounts. It was only at that moment that the banks apparently had a revelation that there was perhaps something wrong with the original forms. Up to that point the banks had never rejected, questioned or even hinted at the fact that there might have been a problem with the forms submitted by Janet Mandeville requesting a change in her beneficiaries.

In short, the lower court's never reached the factual issues regarding the submission of the forms to the banks. The courts below never examined whether or not the banks had an obligation to review the beneficiary forms or to even consider their contents. Obviously, their failure to do so does not result in the efficient administration of the benefit packages. This Court

should grant this writ to ensure that an indepth review of these issues can take place.

## II. FRANK MANDEVILLE IS NOT THE "SURVIVING SPOUSE" OF JANET MANDEVILLE FOR THE PURPOSES OF ERISA, 29 U.S.C. 1001, *et seq.*, BECAUSE HE ABANDONED JANET MANDEVILLE FOR EIGHTEEN MONTHS PRIOR TO HER DEATH AND WAS DEEMED NOT TO HAVE "SURVIVING SPOUSE" STATUS UNDER MICHIGAN LAW.

The Tenth Amendment to the Constitution clearly reserves certain rights to the states. One area of law traditionally left to the states is the definition of spouse or the rules regarding marriage. Although Congress has had ample opportunity, it has not yet defined what is meant by a spouse or established a federal definition for "marriage."

This doctrine is important to the present case because both the trial court and the Sixth Circuit Court of Appeals imposed a common law definition of a spouse even though Michigan had already provided a definition which should have been applied in this circumstance.

This Court should, therefore, grant certiorari to resolve this important question. The Court should use this opportunity to clarify whether or not the definition of spouse as created by the individual states should be used for purposes of adjudicating claims under ERISA.

**A. The trial court and thereafter the Sixth Circuit Court of Appeals erred in using "Federal Common Law" to define the martial relationship of Frank and Janet Mandeville as the definition of martial relations is exclusively within the realm of state law and both courts should have**

**adopted Michigan's definition of a surviving spouse as was required by the Tenth Amendment of the United States Constitution.**

ERISA, 29 U.S.C. §1001, *et seq.*, does not define the term "surviving spouse" and the definition of the term is essential to the resolution of this case. Specifically, Frank Mandeville claims that he is the rightful beneficiary of Janet Mandeville's ERISA funds under 29 U.S.C. § 1055 as he believes he was the "surviving spouse" of Janet Mandeville.

In interpreting the term "surviving spouse" under ERISA the trial court opted to develop a federal common law definition of the term as opposed to following the mandates of the Tenth Amendment and adopting Michigan's definition of the term. Specifically, "[i]t has long been

recognized that '(t)he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.' " *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) *citing Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878). Necessarily, it would only follow that the state has the power to define terms involving martial status such as "spouse" or "surviving spouse" which are incident to marriage. This is due to the fact that "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) *citing United States v. Yazell*, 382 U.S. 341, 352 (1966).

For example, in *Chan v. Bell*, 464 F. Supp. 125 (D.C.D.C. 1978) Immigration and Naturalization Service wanted "to establish for purposes of the immigration laws a species of 'spouse'...[that was] distinguished from the official, state-sanctioned marriage status." *Id. at 131.* While the Court ultimately decided that the Immigration and Naturalization Service did not have the authority to define what a "spouse" was or was not, it determined that if the Immigration Service had such power, it would "raise substantial constitutional problems." *Id. at 131*, fn. 17.

Similarly, in the context of ERISA, the term "married" is not defined in the statutory scheme. In interpreting this term, the courts have adopted a state law definition of the term because it must be presumed that "Congress did not intend to pre-

empt area of traditional state regulation." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). As a result, other courts have determined that the "definition and regulation of marriage is a traditional area of state authority" and have refused to create a federal common law definition of "marriage" when interpreting ERISA. *See Bond v. Trustees of STA-ILA Pension Fund*, 902 F.Supp. 650, 654 -655 (D.Md. 1995). Similarly, since Congress has not defined the term "surviving spouse" in the ERISA statute, and has in no way indicated that ERISA pre-empts a state law definition of a "surviving spouse," the Court must look to state law to define the term "surviving spouse."

Both *Chan v. Bell* and *Bond v. Trustees* are representative of the canon of statutory

interpretation that requires courts to interpret statutory terms in a manner that is consistent with the United States Constitution. Specifically, the "elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper v. People of State of Cal.*, 155 U.S. 648, 657 (1895). As a result, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible...[a court] obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr, 533 U.S. 289*, 299-300 (2001).

In the instant case, Susan Tkachik urged the trial court to adopt the Michigan definition of a "surviving spouse." Specifically, MCL 700.2801 states:

(2) ...a surviving spouse does not include any of the following:

(e) An individual who did any of the following for 1 year or more before the death of the deceased person:

(i) Was willfully absent from the decedent spouse.

(ii) Deserted the decedent spouse.

Under this definition, Frank Mandeville would not qualify as a "surviving spouse."[1] While it would be quite odd if Frank Mandeville were not the "surviving spouse" of Janet Mandeville under Michigan law, but was the "surviving spouse" of Janet Mandeville under Federal law, the major problem with the trial court's definition is that it impermissibly impinges upon the state's rights

[1] The Macomb County Probate Court has previously determined that Frank Mandeville was not the "surviving spouse" of Janet Mandeville under MCL 700.2801 and therefore Mr. Mandeville was precluded from taking any of Janet Mandeville's estate.

under the Tenth Amendment for the sake of creating uniformity under ERISA. As the trial court pointed out, uniformity is an important aspect of ERISA. While the trial court shaped its definition of a "surviving spouse" with the goal of creating uniformity, it failed to realize that Congress and the Courts do not have unlimited power. *Ex parte Quirin*, 317 U.S. 1, 26 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution...."). As evidenced from the Congressional findings and declaration of policy set forth in 29 U.S.C. 1001, Congress derived the power to pass ERISA from the Commerce Clause and its Federal Taxing Powers. The trial court's interpretation expands Congressional power under the Commerce Clause and Federal Taxing Powers

to include an ability to define marital status and relationships, a power that clearly does not exist. As a result, the Michigan definition of a "surviving spouse" must be used for the purposes of ERISA in order to construe the statute in a constitutional manner, as "powers not delegated to the United States by the Constitution...are reserved to the States...." U.S. Const. amend. X.

Notwithstanding the constitutional conundrum created by the trial court's definition of a "surviving spouse" under ERISA, the trial's court logic for determining that MCL 700.2801 was inapplicable was the result of a failure to follow another important rule of statutory construction. Specifically, if statutory words "convey a definite meaning, which involves no absurdity...neither the courts nor the legislature have the right to add to it

or take from it." *Chapman v. Higbee Co.*, 319 F. 3d 825, 835-836 (6th Cir. 2003); *See also Water Quality Ass'n Employees' Benefit Corp. v. US.*, 795 F.2d 1303, 1309 (7th Cir. 1986) ("It is a basic principle of statutory construction that courts have no right...to either add words to or eliminate other words from the statute's language.")

In the instant case, the trial court reasoned that the definition of "surviving spouse" contained in MCL 700.2801 was inapplicable "[b]y its own terms...[because it] only applies to 'parts 1 to 4 of this article and of section 3203.'" The trial court's interpretation of MCL 700.2801 was incorrect as it added the term "only" to the statute. Specifically, if MCL 700.2801 read "***Only*** [f]or purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:..." the

trial court's reading may have been proper. However, the statute does not include the term "only" or any other language limiting the use of the definition of a "surviving spouse" outside of MCL 700.2801. As a result, while the trial court correctly concluded that the probate distribution scheme set forth in the Michigan Estates and Protected Individuals Code, MCL 700.1101, *et seq.* (hereinafter "EPIC") was inapplicable to the distribution Janet Mandeville's ERISA benefits packages, it incorrectly determined that it was free to disregard the Michigan definition of a "surviving spouse."

**B. In the alternative, assuming the lower courts were free to formulate a common law definition of "surviving spouse" under ERISA, they erred in failing to make the distinction between a "spouse" and a "surviving spouse" as the term "spouse" and**

**"surviving spouse" have different meanings under the common law and state law, which should be incorporated into a "federal common law" definition of a surviving spouse.**

Assuming arguendo that the courts have the constitutional power to create a federal common law definition of a "surviving spouse", the trial court erred in defining this term under the ERISA statutory scheme. Specifically, the court failed to use the proper cannons of statutory construction in defining the term "surviving spouse", and even if it had done so, the trial court's interpretation of the term "surviving spouse" defeats the purpose of ERISA.

In interpreting the term "surviving spouse" under ERISA, "[i]t is an elementary rule of statutory construction that we initially look to the plain language of the statute to determine the

meaning of legislation." *Smith v. Allstate Ins. Co.*, 403 F.3d 401, 408 (6th Cir. 2005). In doing so, a court is not "at liberty to construe any statute so as to deny effect to any part of its language." *Regions Hosp. v. Shalala*, 522 U.S. 448, 467 (1998). As a result, "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Id. citing* Bacon's Abridgment, sect. 2. It is also important to note that "ordinary rules of statutory construction would prefer the specific definition over the...general one." *Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993). Finally, in the event the statutory language of ERISA is ambiguous or unclear a court must look "to federal common law which, if not clear, [the court] may draw guidance from analogous state

law." *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990).

In attempting to define the term "surviving spouse" under ERISA, the trial court failed to interpret the term "surviving" and merely equated the term "spouse" with "surviving spouse." Specifically, the trial court determined that a "spouse" was "one's husband or wife by legal marriage." Therefore, it reasoned that "the term 'surviving spouse' refers to the person the participant is legally married to at the time of their death." (R. 59 Opinion & order, pg. 15, JA 303). While this simple syllogism may appear to be intuitively correct at first glance, it utterly fails to take into account the meaning of the word "surviving."

If the lower court had followed proper methods of statutory construction, it would have also defined the term "surviving" instead of disregarding the term as mere surplusage. Specifically, "surviving" means "Living beyond the life of another *or* beyond the happening of some event so as to be entitled to a distribution of property or income." Black's Law Dictionary 1174 (Abridged 7th ed. 2000) (emphasis added). Without citation to authority, or providing any reason whatsoever, the trial court seemingly assumed that the word "surviving" meant "living beyond the life of another" as opposed to "beyond the happening of some event so as to be entitled to a distribution of property or income." This reasoning wears especially thin in light of the fact that the trial court expressly acknowledged that the happening

of an "event", such as murdering one's spouse, means that one is no longer entitled to ERISA benefits despite the fact they outlived their "spouse." As a result, there are certain circumstances in which the term "surviving spouse" is **not** the person the participant is legally married to at the time of their death. Therefore, an intellectually honest reading of 29 U.S.C. §1055, that does not disregard the term "surviving", only leads to the conclusion that the term "surviving spouse" is ambiguous as it is susceptible to multiple meanings.

Under the reasoning set forth in *McMillan*, *supra*, the next step would to be to look to the "federal common law", assuming any exists, to determine the meaning of "surviving spouse." In the instant case, Petitioner has been unable to find

a "federal common law" or "accumulated settled meaning" of the term "surviving spouse." This is most likely due to the fact that the areas of family and probate law, which would be used to define "surviving spouse", are areas of traditional state regulation. *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001). However, as stated above, the trial court's failure to account for the term "surviving" in 29 U.S.C. §1055 fails to follow the ordinary rules of statutory construction which prefer more specific definitions over general ones, and do not allow for terms to be read as mere surplusage.

Given that no federal common law or "accumulated settled meaning" of the term "surviving spouse" has yet been established for the purposes of ERISA, the Court must look to state law for a definition of the term. Currently, at least

thirteen states, including Michigan, specifically define the term "surviving spouse" differently than the term "spouse."[2] These states specifically exempt a "spouse" who may be legally married to a person from being a "surviving spouse" in situations where spousal abandonment or desertion can be proven. *See e.g.* MCL 700.2801 and statutes cited in Fn. 2. If the Court is not constitutionally required to look to each individual state's law to determine whether one qualifies as a surviving spouse, the Appellant would have the Court adopt a "federal common law" definition of the term surviving spouse based upon these state laws. The

---

[2] Connecticut, C.G.S.A. 45a-436 (2007); Indiana, IC 29-1-2-15 (2007); Kentucky, KRS §392.090 (2007); Massachusetts, M.G.L.A. 209 § 36; Michigan, M.C.L.A. 700.2801; Missouri, V.A.M.S. 474.140; New Hampshire, N.H. Rev. Stat. §560:18; New Jersey, N.J.S.A. 3B:8-1; New York, McKinney's EPTL § 5-1.2; North Carolina, N.C.G.S.A. §31A-1; Oregon, O.R.S. § 114.135; Pennsylvania, 20 Pa. C.S.A. § 2106; Virginia, Va. Code Ann. §64.1-16.3

test would be simple and uniform, if it can be proven by a preponderance of the evidence that a spouse had abandoned or deserted the ERISA participant for one year prior to his or her death, and then the spouse is not the "surviving spouse" for the purposes of ERISA. Not only would this test be based upon the state definitions of a "surviving spouse", but also on the deeply rooted English common law principle that "where the husband has abjured the realm, or is banished: for then he is dead in law...." 1 W. Blackstone, *Commentaries on the Laws of England* 423 (1765).

Moreover, the Appellant's proposed federal common law definition of the term "surviving spouse" would further the purposes of ERISA, where as the trial court's definition defeats the purpose of the statute. It "is a well-established

canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute...the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute...and the objects and policy of the law...." *Bob Jones University v. U.S.*, 461 U.S. 574, 586 (1983).

In the instant case, the "federal common law" definition of a "surviving spouse" developed by the trial court fails to take into consideration the public policy principles underlying ERISA. Specifically, "[i]n enacting ERISA, Congress intended to "ensure that plan funds are administered equitably, and that no one party, not even plan beneficiaries, should unjustly profit."

*Martz v. Kurtz*, 907 F.Supp. 848, 855 (M.D.Pa. 1995); *See also* 29 U.S.C.A. §1001(c) (2007).[3] Moreover, ERISA's fundamental purpose is to achieve "a private retirement benefits system that protects workers *and their families.*" *Ellis Nat. Bank of Jacksonville v. Irving Trust Co.*, 786 F.2d 466, 470 (2nd Cir. 1986).

Assuming arguendo the definition of a "surviving spouse" espoused by the trial court was the result of proper statutory construction, it defeats the purpose of ERISA. Specifically, the definition fashioned by the trial court allowed for

---

[3] The policy behind the enactment of ERISA was "to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by *improving the equitable character and the soundness of such plans* by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." 29 U.S.C.A. §1001(c) (2007) (emphasis added).

Frank Mandeville to profit from abandoning Janet Mandeville during her struggle with breast cancer, and various problems that arose as a result of the cancer. In effect, the definition of a "surviving spouse" developed by the trial court rewarded Frank Mandeville for destroying the family unit. As such, it makes scant sense to classify him as a "surviving spouse" for the purposes of ERISA, when the whole purpose of ERISA is to protect the family unit, as opposed to rewarding those who destroy it. As such, assuming that the trial court was not constitutionally mandated to adopt Michigan's definition of a "surviving spouse", it should be reversed as it failed to follow proper rules to statutory construction and failed to take the policies of ERISA into account in defining a federal common law "surviving spouse."

It is clear therefore that this Court should grant certiorari in this matter to determine and settle the definition of spouse under the ERISA statutory scheme.

## III. ASSUMING ARGUENDO THAT FRANK MANDEVILLE IS JANET MANDEVILLE'S SURVIVING SPOUSE FOR THE PURPOSES OF ERISA, THE LOWER COURTS ERRED IN DETERMINING THAT JANET MANDEVILLE DID NOT ELECT TO CHANGE THE BENEFICIARY OF HER ERISA PLANS DURING HER LIFETIME AND THAT FRANK MANDEVILLE'S CONSENT WAS REQUIRED.

### A. The lower courts erred in determining that Janet Mandeville did not elect to change the beneficiary of her ERISA plans during her lifetime when Janet Mandeville wrote letters from her hospital bed to Comerica and Standard Federal Bank on June 28, 2002 prior to her death on July 13, 2002 and by imposing a requirement that Janet Mandeville demonstrate that Frank Mandeville had abandoned

**her within the meaning of 29 U.SC. §1055 and 26 CFR §1.401(a)(20), when the plain language of these rules and regulations do not impose such a requirement.**

The lower courts erred in determining that 29 U.S.C. §1055 and 26 CFR §1.401(a)(20) did not excuse Janet Mandeville from obtaining Frank Mandeville's consent to name Susan Tkachik as her beneficiary after Frank Mandeville had abandoned her and could not be located.

The first error relates to the issues of timing involved with Janet Mandeville naming Susan Tkachik as the beneficiary of her ERISA funds. Specifically, the trial court determined that Janet Mandeville did not make an election under 29 U.S.C. §1055 and 26 CFR §1.401(a)(20), "during the 'applicable election period",' 29 U.S.C.

§1055(c)(1)(A)(i), a period that 'ends on the date of the participant's death,' 29 U.S.C. §1055(c)(7)(B)." (R. 59 Opinion & Order, pg. 18, JA 306). However, the court failed to make a distinction between the date the ERISA participant actually "elects" to make a change under 29 U.S.C. §1055 and the date on which a condition set forth in 29 U.S.C. §1055 is "established to the satisfaction of the plan representative" which causes the election to "take effect."

As stated above, "[i]t is an elementary rule of statutory construction that we initially look to the plain language of the statute to determine the meaning of legislation." *Smith*, 403 F.3d at 408. Similarly, "[i]t is a basic principle of statutory construction that courts have no right...to either add words to or eliminate other words from the

statute's language." *Water Quality Ass'n Employees' Benefit Corp.*, 795 F.2d at 1309.

A plain language reading of 29 U.S.C. §1055 does not support the lower court's position that "date of election" and the "date the election takes effect" are the same date. Specifically, the pertinent statutory language provides that:

> **(1)** A plan meets the requirements of this section only if--
>
> **(A)** under the plan, ***each participant--***
> ***(i) may elect at any time during the applicable election period*** to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both)...
>
> **(2)** Each plan shall provide that ***an election under paragraph (1)(A)(i) shall not take effect*** unless--
>
> **(A)** (i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits)

> which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or
> **(B)** ***it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.***

The lower court was correct in concluding that 29 U.S.C. §1055(c)(1)(A)(i) requires the participant to "elect" or make an "election" during the applicable election period, which is during the participant's lifetime as set forth in 29 U.S.C. §1055(c)(7)(b). However, the term "elect" or "election" is defined as "The exercise of a choice; esp., the act of choosing

from several possible right or remedies in a way that precludes the use of other right or remedies." Black's Law Dictionary 422 (Abridged 7th ed. 2000). As a result, all that is required by 29 U.S.C. §1055(c)(1)(A)(i) is that a participant chooses to make a beneficiary change during his or her lifetime.

In this case, Janet Mandeville clearly put both Comerica and Standard Federal Bank on notice that she was "electing" or making a choice as to who she desired her beneficiary be during her lifetime. Specifically, the letters dated June 28, 2002 and the various accompanying change of beneficiary forms evidence the fact that Janet Mandeville elected to name Susan Tkachik as the beneficiary of her ERISA plans during her lifetime. As a result, the trial court clearly erred in

determining that Janet Mandeville did not elect to change the beneficiary of her ERISA plans during the applicable election period as required by 29 U.S.C. §1055(c)(1)(A).

The second error was failing to read the plain language of the next part of the statute, 29 U.S.C. §1055(c)(2), which outlines when an election takes ***effect*** as opposed to the time period in which an election can be ***made***. The term effect means "[t]o bring about; to make happen." Black's Law Dictionary 420 (Abridged 7th ed. 2000). Similarly, the term "effective date" means "[t]he date on which a statute, contract, insurance policy, or other such instrument becomes enforceable or otherwise takes effect, which sometimes differs from the date on which it was enacted or signed." *Id.* As a result, a plain language reading of 29 U.S.C. §1055 would

allow for an election to be ***made*** during the time period prescribed by 29 U.S.C. §1055(c)(1)(a) and to take ***effect*** or become binding after the requirements of 29 U.S.C. §1055(c)(2) are fulfilled.

In the instant case, Susan Tkachik asked the court to determine if the change of beneficiary forms executed by her sister during the applicable election period took ***effect*** due to the fact that Frank Mandeville could not be located for eighteen months prior to Janet Mandeville's death. The trial court reasoned that the change of beneficiary forms could not take ***effect*** because the fact that Frank Mandeville could not be located was "not established to the satisfaction of a plan representative." While the trial court was correct that the 29 U.S.C. §1055(c)(2) and 26 CFR §1.401(a)-20 have this requirement, it failed to

realize that the whole reason Susan Tkachik was forced to commence suit in federal court is due to the fact that neither Comerica or Standard Federal Bank provided her an adequate opportunity to demonstrate to the plan representatives that Frank Mandeville could not be located.

Specifically, the trial court found that the pursuit of any further administrative remedies with Standard Federal would be "futile." Similarly, in regards to the Comerica benefits, the court determined that "Comerica failed to make any determination regarding Janet Mandeville's benefits as to Plaintiff or Frank Mandeville." As such, the only reason that it has not been shown to the "satisfaction of the plan representatives" that Frank Mandeville was not locatable is because

neither plan representative has allowed Susan Tkachik a fair chance to make such a showing.

Congress specifically enacted 29 U.S.C. §1132 to allow for civil remedies in federal court. As a result, given that Standard Federal failed to provide Susan Tkachik a fair opportunity to demonstrate that Frank Mandeville could not be located, and Comerica passed on making this decision, it is the responsibility of the trial court to determine if Frank Mandeville could not be located within the meaning of 29 U.S.C. §1055. If the trial court did not want to make the decision as to whether Frank Mandeville could not be located within the meaning of 29 U.S.C. §1055, it should have at the very least required the plan administrators to do so. Any other determination would deny Susan Tkachik her due process rights.

Therefore, the trial court should be reversed and this matter remanded for the trial court to make a determination as to whether Frank Mandeville could not be located or instructing the trial court to order further administrative proceedings.

## Conclusion and Relief Requested

Because this case presents an important issue of federal law on which the circuits are divided and which has not been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PENZIEN HIRZEL, PLLC

By: Charles M. Penzien
*Counsel for Petitioner*
17001 19 Mile Road Suite 1B
Clinton Township, MI 48038
(586) 464 -1900

# APPENDIX

## SIXTH CIRCUIT COURT APPEALS FILINGS:

Opinion,
filed 03/11/08 ..... A1 - A3

## EASTERN DISTRICT OF MICHIGAN FILINGS:

Judgment,
filed 01/05/07 ..... B1 - B2

Opinion and Order,
filed 12/26/06 ..... C1 - C30

Motion for Summary Judgment,
filed 08/14/05

Ex.A Macomb County Probate
Court Order ..... D1 - D2

Ex.B Deposition of Frank
Mandeville, Jr., 05/28/03 ... E1 - E72

Ex.C Affidavit of Susan Tkachik,
05/07/05 ..... F1 - F4

Ex.F Janet Mandeville Letter .... G1 - G2

Ex.H Janet Mandeville's Standard
Federal Life Insurance
Change of Beneficiary
Form, 06/27/02 ..... H1 - H2

# APPENDIX, CONTINUED


Ex.I Janet Mandeville's Standard Federal Speed Account Change Of Beneficiary Form ..... I1 - I2

Ex.L *Aetna Life Insurance Co. v. Weatherford,* 1991 U.S. App. LEXIS 1839 ..... J1 - J19

Ex.M *Moukalled v. Mutual Life,* 2002 U.S. Dist. LEXIS16427 K1 - K31


**ADDITIONAL DOCUMENTS:**


26 CFR 1.401(a)-20 ..... L1 - L53

29 U.S.C.A. § 1001 ..... M1 - M4

29 U.S.C.A. § 1055 ..... N1 - N22

29 U.S.C.A. § 1133 ..... O1 - O1

M.C.L.A. 700.2801 ..... P1 - P2

U.S.C.A. Const. Amend. X ..... Q1 - Q1

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION File Name: 08a0143n.06**
**Filed: March 11, 2008**

**Case No. 07-1140**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**SUSAN TKACHIK,**
***Plaintiff-Appellant,***

**v.**

**COMERICA, INC., et at.,**
***Defendants-Appellees.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**

**BEFORE: BOGGS, Chief Judge; BATCHELDER, and GRIFFIN, Circuit Judges.**

**ALICE M. BATCHELDER, Circuit Judge.** In 1995, after 20 years of marriage, Frank Mandeville left his wife Janet. When Janet was diagnosed with breast cancer in 2000, Frank didn't return, didn't call, didn't write. For at least the last

18 months of Janet's life, Janet had no contact with Frank. But they never divorced, Janet never sought a court declaration that he had abandoned her, and Janet never replaced Frank as the beneficiary on her employment benefits plans. She had worked for Comerica, Inc. and Standard Federal Bank, and had survivor benefits from both.

Shortly before her impending death, Janet tried to direct all of her assets to her sister, Susan Tkachik, to prevent anything from going to her estranged husband Frank. Janet executed a trust and a will, and she signed forms attempting to change the beneficiary of her Comerica and Standard Federal benefits. After her death, Frank challenged the will and trust, but the Macomb County (Michigan) Probate Court denied his challenge on finding that he had intentionally abandoned Janet, and therefore, was not a "surviving spouse," pursuant to M.C.L. § 700.2801(2)(e)(i).

In the present case, Ms. Tkachik and Frank both claim Janet's non-testate benefits, and the simple fact is that, although she made some effort to do so, Janet did not do all of the things necessary to change the beneficiary before she died, so Frank remains the beneficiary. Ms. Tkachik sued Comerica, Standard Federal, and Frank, to stop the distribution

to Frank, but the district court rendered summary judgment against her as to all three defendants. On appeal, Ms. Tkachik reargues the same theories she raised to the district court.

After carefully reviewing the record, the law, the briefs, and the arguments by counsel, we conclude that the district court's opinion correctly sets out the applicable law and correctly applies that law to the facts contained in the record. The issuance of a full written opinion by this court would serve no useful purpose. Accordingly, for the reasons stated in the district court's opinion, we **AFFIRM**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SUSAN TKACHIK,
*Plaintiff,*

v. Case No. 05-72703
Hon. Sean F. Cox

COMERICA INCORPORATED;
STANDARD FEDERAL BANK, N.A.;
and FRANK MANDEVILLE,
*Defendants.*

**JUDGMENT**

This matter came before the Court on Defendants' Motions to dismiss and Motion for summary judgment. The Court granted Defendant Frank Mandeville's Motion for summary judgment on December 26, 2006. [Doc. 59J.

Accordingly, the Court awards judgment in favor of Defendants and against Plaintiff.

**IT IS SO ORDERED.**

s/ Sean F. Cox
SEAN F. COX
United States District Judge

DATED: January 5,2007

**PROOF OF SERVICE**

The undersigned certifies that the foregoing order was served upon counsel of record via the Court's ECF System and/or U. S. Mail on January 5, 2007.

s/Jennifer Hernandez
Case Manager to
District Judge Sean F. Cox

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

SUSAN TKACHIK,
*Plaintiff,*

v.

Case No. 05-72703
Hon. Sean F. Cox

COMERICA INCORPORATED;
STANDARD FEDERAL BANK, N.A.;
and FRANK MANDEVILLE,
*Defendants.*

## OPINION AND ORDER

This matter is before the Court on Defendant Comerica's Motion for interpleader, *etc.*; Defendant Standard Federal's Motion to dismiss; Defendant/Cross Plaintiff Frank Mandeville's Concurrence in Defendants' Standard Federal Bank and Comerica, Inc.'s Motion to Dismiss and Defendant Mandeville's Motion for Summary Judgment; Plaintiff's Motion for Summary Judgment; and Defendant Comerica's Motion for award of reasonable attorney's fees. All parties have fully briefed the issues and a hearing was held December 18, 2006. For the following reasons, the Court

**GRANTS** Defendant/Cross Plaintiff Frank Mandeville's Motion for summary judgment; **DENIES** Plaintiff's Motion for summary judgment; **DENIES** Defendant Standard Federal's Motion to dismiss; **MOOTS** Defendant Comerica's Motion for interpleader, *etc.*; and **DENIES** Defendant Comerica's Motion for award of reasonable attorney's fees.

## I. BACKGROUND

This action arises out of a dispute regarding who is the proper beneficiary of the decedent Janet Mandeville's benefit packages from Comerica, Inc. ("Comerica"), and Standard Federal Bank ("Standard Federal")(n/kJa LaSalle Bank).

Janet Mandeville was employed at various times by Defendants Comerica and Standard Federal. Through her employment, Janet acquired a "benefit package" with Comerica and Standard Federal. The benefit packages were assignable to a named beneficiary in the event of Janet Mandeville's death. Janet Mandeville named her husband, Defendant Frank Mandeville as the beneficiary.

Janet and Frank Mandeville's marriage deteriorated. Frank Mandeville was out of the country for eighteen months prior to Janet

Mandeville's death and did not communicate with her during that time.

On June 27, 2002, shortly before her death, Janet Mandeville executed a living trust and a last will and testament. Both documents provided that nothing was to go to her estranged husband, Frank Mandeville. Janet Mandeville also signed forms to change the beneficiary of her benefit packages with Comerica and Standard Federal from Frank Mandeville to her sister, Plaintiff Susan Tkachik. Plaintiff is also the personal representative of Janet Mandeville's estate.

In order to change the beneficiary, spousal consent is required. The change of beneficiary fonn signed by Janet Mandeville for Stimdard Federal did not include Frank Mandeville's consent. Janet Mandeville also signed a change ofbeneficiary fonn to transfer her assets with Comerica. The Comerica fonn was allegedly signed by Frank Mandeville, but the signature was not dated or notarized and Frank Mandeville denies he signed the fonn. Janet Mandeville died from breast cancer on July 13, 2002.

Following Janet Mandeville's death, Plaintiff requested Janet Mandeville's benefit packages with Comerica and Standard Federal be disbursed to her. The change ofbeneficiary form signed by Janet

Mandeville was submitted to Standard Federal in December 2002. Standard Federal replied by letter on March] 8, 2003. Standard Federal had already disbursed the benefit package to Frank Mandeville on August 6, 2002. It advised Plaintiff that the change of beneficiary designation was invalid without spousal consent. Standard Federal also advised Plaintiff that she could pursue an administrative appeal. Plaintiff did not appeal.

Comerica did not disburse the benefit package and did not issue a formal denial. It is awaiting the outcome of the instant litigation. Comerica seeks by motion to be allowed interpleader as it claims it has no substantive interest in the litigation.

On October 8, 2003, the Macomb County Probate Court issued an order granting summary judgment determining that Defendant Frank Mandeville is not a "surviving spouse" of Janet Mandeville for purposes of Michigan's intestate succession laws. The Probate Court found that Frank Mandeville was absent from his spouse for more than one year, and therefore could not contest her trust, pursuant to MCL 700.280 I (2)( e )(i) ..

On July 8, 2005, Plaintiff filed a Complaint with this Court. An Amended Complaint was. filed October 13, 2005, alleging: (I) breach of contract by

Comerica and Standard Federal; (2) seeking declaratory relief against Comerica, Standard Federal, and Frank Mandeville; and (3) breach of fiduciary duty against Standard Federal. Plaintiff claims her action is brought pursuant to the Employee Retirement Income Security Act (ERISA), 29 USC §1001~ et seq. On January 3, 2006, Defendant Frank Mandeville filed a Crossclaim against Comerica seeking payment of Janet Mandeville's benefit package.

Several motions are pending. On June 14, 2006, Standard Federal filed a Motion to dismiss. Comerica field a Motion for interpleader; to dismiss; and for summary judgment on June 16, 2006. On June 30, 2006, Defendant Frank Mandeville filed a concurrence in Standard Federal and Comerica's Motions to dismiss and his own Motion for summary judgment. On August 14,2006, Plaintiff filed a Motion for summary judgment against all Defendants. Lastly, on August 30, 2006, Comerica filed a Motion for award of reason able attorney's fees.

## II. STANDARD OF REVIEW

"[A] complaint may be dismissed for failure to state a claim upon which relief can be granted. The court must construe the complaint in a light most

favorable to the plaintiff, and accept all of her factual allegations as true. When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. Dismissal pursuant to a Rule 12(b)(6) motion is proper only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Bloch v. Ribar*, 156 F.3d 673,677 (6th Cir. 1998) (citation omitted).

Under Fed. R. Civ. P 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to, any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995). A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171,174 (6th Cir. 1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also

draw all reasonable inferences in the nonmoving party's favor. *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

## III. ANALYSIS

### A. Is Plaintiff's Claim Styled "Breach of Contract" Preempted by ERISA?

Defendants argue that Count I of the Amended Complaint, titled "breach of contract," is preempted by ERISA. Plaintiff contends that despite her reference to the elements of breach of contract, the claim is actually one for wrongful denial of benefits under 29 USC §1132(a)(1)(B). Plaintiff directs the Court to ¶61 of the Amended Complaint which states that Standard Federal and Comerica allegedly failed to honor the benefit plan when they refused to assigil the benefits to Plaintiff, the rightful beneficiary. With respect to Standard Federal, Plaintiff asserts that this claim is in the alternative of her claim for breach of fiduciary duty.

"[T]he fundamental tenor of the [Federal Rules of Civil Procedure] is one of liberality rather than technicality ... " *Minger v. Green*, 239 F.3d 793, 799 (6th Cir. 2001). The court construes pleadings liberally as part of a notice-pleading regime. *Id.*

Plaintiff's pleading, though inartful, nonetheless gives fair notice to Comerica and

Standard Federal of her claims. Thus, Defendants are not entitled to dismissal of Plaintiff's ERISA claim for wrongful denial of benefits.

### B. Are Plaintiff's Claims Barred for Failure to Administratively Exhaust?

Although ERISA does not explicitly require exhaustion, ERISA does require benefit plans to provide internal dispute resolution procedures. *Baxter v. CA. Muer Corporation*, 941 F.2d 451,453 (6th Cir. 1991)(citation omitted). The intent in mandating the internal claims procedures was "to minimize the number of frivolous ERISA lawsuits; promote the consistent treatment of benefit claims; provide a nonadversarial dispute resolution process; and decrease the cost and time of claims settlement." *Id.* (citing *Makar v. Health Care Corporation of Mid-Atlantic*, 872 F.2d 80, 83 (4th Cir. 1989)). Further, the exhaustion requirement enables plan fiduciaries to "efficiently manage their funds; correct their errors; interpret plan provisions; and assemble a factual record which will assist a court in reviewing the fiduciaries' actions." *Id.* Thus, courts generally require a participant to exhaust his or her administrative remedies prior to commencing suit in federal court. *Id.* But, "the decision whether to apply

the exhaustion requirement is committed to the district court's sound discretion and can be overturned on appeal only if the district court has abused its discretion." *Id.* at 453.

There is no dispute here that Plaintiff did not exhaust her administrative remedies. Standard Federal sent a letter to Plaintiff's previous counsel on March 18, 2003, indicating that it would not honor the change of beneficiary form it received on December 24, 2002 (dated June 27, 2002) because the required spousal waiver was absent. [First Amended Complaint, Exhibit H]. The letter noted that Plaintiff could appeal the decision in accordance with the benefit plan's appeal procedure, which was enclosed. *Id.* Plaintiff did not file an appeal. Comerica apparently did not respond to Plaintiff's demand. Rather, Comerica refused to pay benefits to Frank Mandeville or Plaintiff until the dispute is resolved. Plaintiff made no attempts to appeal.

Plaintiff contends administrative appeal would be futile. "[A] court is obliged to exercise its discretion to excuse nonexhaustion where resorting to the plan's administrative procedure would simply be futile or the remedy inadequate." *Fallick v. Nationwide Mutual Insurance Company*, 162 F.3d 410, 419 (6th Cir. 1998)(citing *Costantino v. TRW, Inc.*, 13 F.3d

969 (6th Cir. 1994). "The standard for adjudging the futility of resorting to the administrative remedies provided by a plan is whether clear and positive indication of futility can be made." *Id.* "A plaintiff must show that it is certain that [her] claims will be denied on appeal, not merely that [she] doubts that an appeal will result in a different decision." *Id.* "The futility exception is quite restricted and has been applied only where resort to administrative remedies is clearly useless." *Id.* (citing *Communications Workers of America v. AT&T*, 40 F.3d 426 (D.C.Cir. 1994)).

### 1. Would Appeal to Standard Federal be Futile?

Plaintiff argues that appeal to Standard Federal would be futile because she is not challenging Standard Federal's determination that consent was absent. Instead, she is challenging whether Frank Mandeville can be considered a surviving spouse in accordance with the benefit plan where he was found not to be a "surviving spouse" by a state probate court with regard to intestate succession. Plaintiff contends that Standard Federal refused to consider the Probate Court's Order noting "Standard Federal would not even take account of the factual finding that Frank Mandeville was willfully

absent from his marriage for over one year, a factual determination which should be considered when considering whether Frank Mandeville abandoned his wife under ERISA." [Doc. 31, pA]. Plaintiff goes on to argue, without reference to authority, that Standard Federal may not determine who is a surviving spouse becaus.e that determination rests with state law. *Id.* at p.5.

Plaintiff submitted the change of beneficiary form to Standard Federal after Janet Mandeville's death. Standard Federal issued a letter on March 18, 2003 informing Plaintiff that it would not honor the change of beneficiary form. Standard Federal stated that Plaintiff "now requested the placement of a hold on the Plan benefits now held in Mr. Mandeville's name pending a determination by a Michigan State Court that is presently reviewing claims relating to the estate of Janet Mandeville." [First Amended Complaint, Exhibit H]. Standard Federal concluded that based on court precedent, "it is our position that the Plan can not be bound by any finding of the Michigan State Court that would require a result that is inconsistent with or contrary to the provisions of the plan document and that any finding of the Michigan Court would necessarily be preempted by ERISA." *Id.*

What Plaintiff challenges is Standard Federal's definition of the term "surviving spouse" in the application of its benefit plan. Plaintiff contends that for purposes of ERISA, the definition used in Michigan intestacy law to define a surviving spouse should be applied, particularly in this case where a probate court has made a ruling regarding the status of an individual as a surviving spouse. It is not clear whether Standard Federal actually considered whether the probate court ruling is inconsistent with or contrary to the benefit plan, or whether it considered if spousal consent was required in this case in light of Frank Mandeville's absence. However, Plaintiff does provide an affidavit averring that sometime prior to March 18, 2003, she met with Sylvia Baker ("Baker"), the Vice President of Standard Federal's Human Resource and Benefits division. [First Amended Complaint, Exhibit G]. Plaintiff claims she told Baker that Frank Mandeville had abandoned Janet Mandeville and that his whereabouts were unknown for a year and a half prior to Janet's death. *Id.* Allegedly, Plaintiff was advised that Standard Federal would not transfer Janet Mandeville's benefits until her estate was probated, and would not assign the benefits without a court order requiring them to do so. *Id.*

It would be futile to require Plaintiff to administratively appeal Standard Federal's decision. Taking facts and drawing inferences in Plaintiffs favor, Standard Federal was aware of the pending probate court litigation and Plaintiff's assertions that Frank Mandeville abandoned Janet Mandeville and his whereabouts were unknown for more than a year prior to her death. Yet, it implicitly determined that spousal consent was nonetheless required by failing to honor the change of beneficiary form without Frank Mandeville's consent. Moreover, Standard Federal denied that it is bound by the state probate court ruling that Frank Mandeville is not a surviving spouse for purposes of intestate succession. And, Standard Federal had already disbursed the benefits to Frank Mandeville. Appeal would be futile in this case. Additionally, it is clear from Standard Federal's positive indication that based on its interpretation of Supreme Court and Sixth Circuit precedent it is not required to abide by a Michigan state court decision, that the subsequent ruling by the probate court would not result in a different decision.

Moreover, at the hearing, counsel for Standard Federal stated that a change of beneficiary cannot be done after the death of the plan participant. Thus,

any attempt to change the beneficiary after the death of Janet Mandeville would be futile.

### 2. Would Appeal to Comerica be Futile?

Comerica seeks summary judgment for failure to exhaust administrative remedies only as to Count II. Plaintiff's Count II seeks declaratory relief asking this Court to declare Plaintiff the beneficiary of Janet Mandeville's benefits package with Comerica and to declare that Frank Mandeville does not have an interest. [First Amended Complaint, ¶¶77-78].

This issue cannot be determined from the facts provided. It is unclear exactly what accounts Janet Mandeville has with Comerica that are in dispute. In an affidavit provided by Cynthia Mitchell, a Benefits Specialist at Comerica, Plaintiff only presented a claim for death benefits from Janet Mandeville's accourit in the "Comerica Incorporated Preferred Savings Plan." [Doc. 28, Exhibit 1]. Comerica claims Plaintiff never claimed an interest in life insurance or pension accounts. However, attached to the First Amended Complaint, Plaintiff includes a change of beneficiary form that includes Janet Mandeville's belief that she changed the beneficiary on her pension, 401K, profit sharing plan, and any other benefit held by Comerica. [First Amended Complaint,

Exhibit C]. Comerica failed to make any determination regarding Janet Mandeville's benefits as to Plaintiff or Frank Mandeville.

The Court is without sufficient information to determine what accounts are at issue, whether Plaintiff presented a claim for those benefits, and what Comerica's response was. The Court cannot rule on whether it would be futile for Plaintiff to exhaust her administrative remedies.

### C. Cross Motions for Summary Judgement on the Merits

Defendant Frank Mandeville moves for summary judgment on Plaintiff's claim that she is the beneficiary of Janet Mandeville's benefit packages with Standard Federal and Comerica. Defendant Mandeville argues that the change of beneficiary was invalid without his consent. Further, Defendant Mandeville asserts that the probate court order is limited and inapplicable in this case. Lastly, he contends that even if the :fmdings of the probate court order and Plaintiff's affidavit are true, it was incumbent on the plan participant, *i.e.* Janet Mandeville, to make a showing that his consent was unnecessary. Because Janet Mandeville never argued she was abandoned or was unable to locate

Defendant Mandeville, Defendant Mandeville alleges Plaintiff's claims are untimely.

Plaintiff argues first that Defendant Mandeville is not a surviving spouse because the definition of "surviving spouse" as used in ERISA must rely on state law. Plaintiff concludes that the definition of "surviving spouse" used in Michigan's intestacy laws is the applicable state law definition. Because Defendant Mandeville was adjudged not to be a surviving spouse under Michigan intestacy laws by the Macomb County Probate Court, he is likewise not a surviving spouse for purposes of ERISA and his consent was therefore not required for Janet Mandeville to change her beneficiary. Plaintiff argues that at the very least, if the Court is not bound by the Probate Court's Order, the factual finding that Frank Mandeville was willfully absent from Janet Mandeville for at least a year preceding her death should be given preclusive effect. Plaintiff contends that taking the judgment of the Probate Court, in addition to the change of beneficiary forms completed by Janet Mandeville, there was timely literal compliance with 29 USC §1055(c)(2)(B):

(c) Plans meeting requirements of section

(2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless -

(B) It is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of Treasury may be regulations prescribe.

In the altemative, Plaintiff argues that Janet Mandeville substantially complied with ERISA. Plaintiff does not direct the Court to any authority that the doctrine of substantial compliance is applicable to 29 USC §1055. Plaintiff does cite cases where the doctrine was applied, but it was only with regard to 29 USC § 1133 which deals with notice requirements plan administrators must follow to notify a participant or beneficiary of a denial of a claim. Plaintiff concludes that by analogy, the doctrine of substantial compliance is also applicable where a participant attempts to notify the plan administrator of a change of beneficiary.

Plaintiff's argument is without merit. Even if the Court were to apply substantial compliance,

Janet Mandeville did not substantially comply. Plaintiff contends that Janet Mandeville could not fully comply because of time constraints, as she signed the change of beneficiary forms two weeks prior to her death. However, the change of beneficiary form submitted to Comerica included Frank Mandeville's alleged signature. At the hearing, Plaintiff's counsel speculated that the form was signed in 1994. Taking the facts as alleged by Plaintiff, Janet Mandeville did not have contact or know the whereabouts of Frank Mandeville for 18 months prior to her death. Assuming the signature is that of Frank Mandeville, Janet Mandeville started the process of changing the beneficiary well over a year prior to her death. Thus, there was ample time to comply with the procedural requirements such that the Court should not resort to the doctrine of substantial compliance, assuming *arguendo* that it is applicable.

In Plaintiff's Motion for summary judgment, she claims she is entitled to summary judgment on several grounds. First, she contends that Frank Mandeville's consent was not necessary for Janet Mandeville to change her beneficiary because Frank Mandeville was not a "surviving spouse" within the meaning of ERISA. Plaintiff relies on the definition

of "surviving spouse" set forth in Michigan intestacy laws. Second, Plaintiff contends that if Frank Mandeville is found to be Janet Mandeville's "surviving spouse," his consent was still not necessary pursuant to 29 USC §1055(c)(2)(B) and 26 CFR § 1.401 (a)-20 because he abandoned Janet Mandeville and because he could not be located.

### 1. Is Frank Mandeville a "surviving spouse" for purposes of ERISA?

ERISA does not define the term "spouse." When a statute leaves a term undefined and the term has an "accumulated settled meaning" under the common law, there is a presumption that Congress meant to incorporate the common law definition into the statute. *Johnson v. City of Saline*, 151 F.3d 564, 568 (6th Cir. 1998)(citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992).

Rather than look to federal common law, Plaintiff asks the Court to look to Michigan law. Specifically, Plaintiff arglies the Court should apply the definition of surviving spouse used in MCL 700.2801:

> (1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a

subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(2) For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in- this state, unless they subsequently participate in a marriage ceremony purporting to many each to the other or live together as husband and wife.

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual.

(c) An individual who was a party to a valid proceeding concluding by an order purporting to terminate all marital property rights.

(d) An individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual.

( e) An individual who did any of the following for 1 year or more before the death of the deceased person:

(i) Was willfully absent from the decedent spouse.
(ii) Deserted the decedent spouse.
(iii) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.

The Supreme Court gives some direction regarding when to look to state law to define a term in a federal statute:

> Congress sometimes intends that a statutory term be given content by the application of state law. We start, however, with the general assumption that 'in the absence of a plain indication to the contrary, ... Congress when it enacts a statute is not making the application of the federal act dependent on state law.' One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application. Accordingly, **the cases in which we have found that Congress intended a state-law definition of a statutory term have**

**often been those where uniformity clearly was not intended.**

*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)(emphasis added). Uniformity is a "vital component of the ERISA framework." *DaimlerChrysler Corporation v. Durden*, 448 F.3d 918, 928 (6th Cir. 2006).

In this case, there is federal common law, or an "accumulated settled meaning" of the term "spouse" for purposes of ERISA. A spouse is. "[o]ne's husband or wife by legal marriage." *Williams v. Board of Trustees of the International Longshoremen's Association*, 388 F.Supp.2d 1353, 1365 (S.D.Fl. 2005). *See Gallagher v. Park West Bank and Trust Co.*, 921 F.Supp. 867, 877 (D.Mass. 1996) and *Davis v. College Suppliers Company*, 813 F.Su,pp. 1234, 1237 (S.D. Miss. 1993)("[T]he common law meaning of spouse is settled, straightforward, and dispositive: spouse means a man or woman joined in wedlock, in short, one's husband or wife.")(both citing *Kahn v. Kahn*, 801 F.Supp. 1237, 1241 (S.D.N.Y. 1992)). See also *Croskey v. Ford Motor Company UAW*, 2002 WL 974827, *4 (S.D.N.Y. 2002)("{A]ll federal courts to have considered the issue have determined that the [ERISA] term 'spouse' refers to the legal spouse.").

Thus, for purposes of ERISA, the term "surviving spouse" refers to the person the participant is legally married to at the time of their death. Resort to state law to determine what is meant by "surviving spouse" is unnecessary. However, determining *who* the participant is legally married to is dependent on state law because there is no federal common-law with respect to marriage. The ERISA pre-emption provision was intended to "displace all state laws that fall within its sphere... " *Metropolitan Life Ins. Co. v. Massachusetts Traveler's Ins. Co.*, 471 U.S. 724, 739 (1985). However, the court also presumes that "Congress did not intend to pre-empt areas of traditional state regulation." *Id.* at 740. In this case, whether Frank Mandeville is a "surviving spouse" for purposes of ERISA depends on whether he was legally married to Janet Mandeville at the time of her death.

The definition of "surviving spouse" set forth in MCL 700.2801 is inapplicable to this determination. By its own terms, that definition only applies to "parts 1 to 4 of this article and of section 3203." A ruling that an individual is not a "surviving spouse" under MCL 700.2801 does not extinguish the legal marital relationship.

Nonetheless, the factual finding that Frank Mandeville was willfully absent from Janet Mandeville for at least one year prior to her death is binding. But, Plaintiff does not offer any evidence that such a finding terminates the legal marital relationship. Plaintiff does not provide the Court with any Michigan domestic relations law supporting the proposition that Frank Mandeville was not legally married to Janet Mandeville at the time of her death. It is undisputed that Frank and Janet Mandeville were married. Janet Mandeville considered herself to be married to Frank Mandeville as late as June 28, 2002, when she wrote a letter to Comerica seeking to change her beneficiary. [Plaintiff's Motion, Exhibit F].

Plaintiff contends that whether parties were legally married is not the *sine qua non* of whether an individual is a surviving spouse for purposes of ERISA. Plaintiff points to "slayer statutes" which provide that a spouse who kills the participant spouse is not entitled to the deceased participant spouse's ERISA benefits. In the cases cited by Plaintiff, the courts relied on equitable principles. [Plaintiff's Motion, p.7]. The equitable principles behind the "slayer" exception are not applicable here. First, it is axiomatic that one cannot be allowed to

profit from his own wrongs. *Illinois v. Allen*, 397 U.S. 337, 350 (1970). There is no indication that Frank Mandeville committed a "wrong" that is commensurate with murder. Further, where one spouse kills the other, there is presumably no prior warning. So, the court may equitably deem that the deceased spouse did not intend that the slayer spouse should receive ERISA benefits. The same considerations are not present where the participant spouse is abandoned. In fact, ERISA explicitly sets forth the procedure for changing a beneficiary in such a situation. There is no reason why Janet Mandeville could not have complied with the procedural requirements to change her beneficiary. From the documents submitted with Plaintiff's Motion, it appears Janet Mandeville's attempted to obtain Frank Mandeville's consent sometime prior to the abandonment. [Plaintiff's Motion, Exhibit F). Plaintiff's counsel speculated the change of beneficiary form for Comerica may have been signed by Frank Mandeville as early as 1994. The fact that Frank Mandeville may have abandoned Janet Mandeville, did not obviate the requirement that she either obtain his consent, or comply with other procedural requirements, in order to change her beneficiary.

Accordingly, because it is undisputed that Frank and lanet Mandeville were legally married, and Plaintiff fails to offer any evidence that the marriage was legally terminated, Defendant Frank Mandeville is Janet Mandeville's surviving spouse at the time of her death for purposes of ERISA.

2. **Was Frank Mandeville's consent necessary to change beneficiaries on Janet Mandeville's benefit plans in light of 29 USC §1055(c)(2)(B) and 26 CFR §1.401(a)-20?**

Plaintiff contends that even if Frank Mandeville is Janet Mandeville's surviving spouse for purposes of ERISA, his consent was not necessary to change her beneficiary. Plaintiff relies on Secretary of Treasury regulation 26 CFR §1.401(a)-20:

> Q-27: Are there circumstances when spousal consent to a participant's election to waive the QJSA or the QPSA is not required?
>
> A-27: Yes. If it is established to the satisfaction of a plan representative that there is no spouse or that the spouse cannot he located, spousal consent to waive the QJSA or the QPSA

> is not required. If the spouse is legally incompetent to give consent, the spouse's legal guardian, even if the guardian is a participant, may give consent. Also, if the participant is legally separated or the participant has been abandoned (within the meaning of local law) and the participant has a court order to such effect, spousal consent is not required unless a QDRO provides otherwise.

Plaintiff relies on the probate court order that Frank Mandeville was willfully absent from Janet Mandeville for a year or more prior to her death to satisfy the requirement that the participant was abandoned within the meaning of local law. However, Plaintiff ignores the language in the regulation requiring that "**the participant** has a court order to such effect" (emphasis added). It is undisputed here that the participant, Janet Mandeville, did not have a court order stating she had heen abandoned. The probate court order relied on by Plaintiff was issued after Janet Mandeville's death. [Plaintiff's Motion, ExhibitA]. Additionally, Plaintiff does not direct the Court to any authority that Frank Mandeville's absence constitutes abandonment "within the meaning of local law."

Moreover, an attempt to change tbe beneficiary after the death of the participant is untimely. "ERISA provides that a participant's election to waive the surviving spouse pension - whether or not consented to by the spouse - must be made during the 'applicable election period,' 29 USC §1055(c)(l)(A)(i), a period that 'ends on the date of the participant's death,' 29 USC §1055(c)(7)(B). *Davenport v. Davenport*, 146 F.Supp.2d 770, 781 (M.D.N.C. 2001). In *Davenport*, the court specifically held that an attempt by the estate of the deceased participant to obtain a court order of abandonment would serve no purpose because "post-death issuance of an abandonment order would not be valid under ERISA. .. " *Id.* at 780-781.

Additionally, Plaintiffs claim that Frank Mandeville's consent was unnecessary because he could not be located is also untimely. First, that fact was not established to the satisfaction of a plan representative. See 26 CFR §1.401(a)-20. Second, as discussed above, any posthumous attempt to change the beneficiary on Janet Mandeville's benefit plans is untimely.

Accordingly, Frank Mandeville is entitled to summary judgment on Plaintiffs claims of entitlement to Janet Mandeville's benefit plans with

Defendants Comerica and Standard Federal. Frank Mandeville is the beneficiary of Janet Mandeville's benefit packages with Comerica and Standard Federal.

Because this disposes ofthe claims, the Court does not reach Comcrica's Motion for interpleader. The Court denies Comerica's requestfor attorney's fees.

## IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant/Cross Plaintiff Frank Mandeville's Motion for summary judgment; **DENIES** Plaintiff's Motion for summary judgment; **DENIES** Defendant Standard Federal's Motion to dismiss; **MOOTS** Defendant Comerica's Motion for interpleader, *etc.*; and **DENIES** Defendant Comerica's Motion for award of reasonable attorney's fees.

**IT IS SO ORDERED.**

**S/Sean F. Cox**
**Sean F. Cox**
**United States District Judge**

**Dated: December 26, 2006**

**I hereby certify that a copy of the foregoing document was served upon counsel of record on December 26, 2006, by electronic and/or ordinary mail.**

**S/Jennifer Hernandez**
**Case Manager**

**STATE OF MICHIGAN**
**IN THE PROBATE COURT**
**FOR THE COUNTY OF MACOMB**

Estate of Janet Elaine Mandeville, Deceased

File No. 02-175-212-DE
Hon. Pamela G. O'Sullivan

_____/

MALACH, SMITH & GREENBERG, LLP
Steven H. Malach (P28799)
Priscilla V. Hirt (P31670)
Attorneys for Susan Tkachik

CASHEN & STREHL
William K. Cashen (P38922)
Donald M. Strehl (P37750)
Attorneys for Frank Mandeville, Jr.

Robert S. Huth, Jr. (P42531)
Personal Representative of Estate
KIRK & HUTH, P.C.

_____/

**ORDER GRANTING SUMMARY DISPOSITION DETERMINING FRANK MANDEVILLE, JR. IS NOT A SURVIVING SPOUSE**

At a session of said Court, held in the City of Mt. Clemens, County of Macomb, State of Michigan on October 08, 2003

PRESENT: Hon. Pamela G. O'Sullivan
PROBATE JUDGE

This matter having come before the Court on Susan Tkachik's Motion for Summary Disposition and the Response to the Motion by Frank Mandeville, Jr., and after oral arguments, and the Court being otherwise fully advised;

IT IS HEREBY ORDERED that Susan Tkachik's Motion to Sumary Disposition determining Frank Mandeville, Jr. is not a surviving spouse pursuant to MCLA 700.2801 is hereby granted.

/s/ Pamela G. O'Sullivan
Probate Judge

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE
COUNTY OF MACOMB

In the Matter of the Estate of:
Janet Elaine Mandeville, Deceased,

File No. 02-17S,212-DE
Hon. Pamela G. O'Sullivan

ROBERT S. RUTH, JR.,
Personal Representative
of the ESTATE of
JANET ELAINE MANDEVILLE,

Plaintiff, File No. 02-17S,212-DE
Hon. Pamela G. O'Sullivan

vs.

SUSAN TKACHIK,

Defendant.

DEPOSITION OF FRANK MANDEVILLE, JR.

Taken by the Defendant at the offices of CASHEN & STREHL, located at 45700 Village Boulevard, Shelby Township, Michigan, on Wednesday, May 28, 2003, at 2:00 p.m.

APPEARANCES:

Attorney for Frank Mandeville, Jr.: WILLIAM K. CASHEN (P39822)
45700 Village Boulevard
Shelby Township, MI 48315
(586) 532-4100

Attorney for Susan Tkachik: STEVEN H. MALACH (P28799)
28411 Northwestern Hwy.
Suite-930
Southfield, MI 48034
(248) 353-1700

Also Present: Susan Tkachik

RECORDED BY: REGENCY COURT REPORTING
3133 Union Lake Road,
Suite A
Commerce Township, MI 48382
(248) 360-2145

TABLE OF CONTENTS


| WITNESS: | PAGE |
|---|---|
| FRANK MANDEVILLE, JR. | 5 |

EXHIBITS:

Shelby Township, Michigan

May 28, 2003, Wednesday - 2:25 p.m

* * * * *

COURT REPORTER: Please raise your right hand for me.

MR. CASHEN: You should be sworn is under oath, it's your deposition.

COURT REPORTER: Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth?

(No verbal response)

MR. CASHEN: say "yes."'

MR. MANDEVILLE: Yes.

COURT REPORTER: Thank you.

MR. MALACH: Let the Record reflect this is the day and time scheduled for the deposition of Frank Handevi11e, Notice having previously been provided to Counsel which result of which will be used by, for any and all purposes authorized by the

Court Rules and the case laws provided.

Good afternoon, Mr. Mandeville. My name is Steven Malach, I represent Susan Tkachik in this case pending in the Macomb County Probate Court. Today is the day scheduled for your deposition. I'm going to be asking you a series of questions to which I assume I will receive truthful answers. Have you ever had your deposition taken before, sir?

(No verbal response)

MR. CASHEN: You can answer that.

THE WITNESS: Yes.

MR. MALACH: Then, just to go over what you should have been advised of in the past and, deposition is being recorded, audio -- by audio tape, so that any gestures or nodding of your head couldn't be record as a response. The only tiling that can be recorded is your verbal response: do you understand that?

(No verbal response)

MR. CASHEN: You can answer.

THE WITNESS: Yes.

MR. MALACH: Also, please try and speak up and unlike normal conversation, try not to use as a response "uh-huh" or "mm-hmm" because the tape can't decide if that's an appropriate response; fair enough?

THE WITNESS: Yes.

MR. MALACH: Okay. Do you have any other questions before we begin?

THE WITNESS: How much do you get paid an hour to ask me questions?

MR. MALACH: I get paid by Ms. Tkachik to represent her in various legal matters. Do you have any other questions about this deposition before we start?

THE WITNESS: No.

FRANK MANDEVILLE. JR.

HAVING BEEN CALLED AND SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. MALACH:

Q All right. Would you state your full name for the Record, please?

A (No verbal response)

MR. CASHEN: You can answer that

BY THE WITNESS:

A Frank Mandeville.1L

Q All right. Where do you live? A I have no permanent address.

Q Where have you lived in the recent past? Where do you live right now?

A Could you define "live"?

Q Where you sleep.

MR. CASHEN: You can answer that if you want to.

BY MR. MALACH:

Q Sir?

A In a variety of places.

Q Would you please tell us where you stay, where you sleep?

A On what night?

Q Last night

A My mother's.

Q And what is that address?

A I don't know.

Q What street is it on?

A North Avenue.

Q In what city?

A I don't know.

Q Is it in the county here?

A I believe so.

Q What is your mother's name?

A Olga Mandeville.

Q An right. And where did you stay before then

A I don't remember.

Q Last week, where did you live, sir; where were you staying?

A I don't remember.

Q You don't remember?

A Yes.

Q Are you on any medication?

A No.

Q Okay. Are you under a doctor's care for anything?

A No.

Q Have you been informed by a professional that

you have problems with recall, or memory?

A I do not believe so.

Q All righty. I'll ask you again: where did you live/sleep before you stayed at your mother's last night?

MR. CASHEN: Objection, it's been asked and answered. The Witness has already responded he doesn't remember, and there is also an objection on the grounds of relevance. I would suggest we move on to more material matters.

BY MR. MALACH:

Q Well, with all due respect to your Counsel's objection, part of the issue here is where you've been living at for the last few years, so we'll be delving into this at length. Can you tell me where you have lived in the last two years at all?

A I cannot provide street addresses.

Q Tell me where you lived by any way you can, sir. A I don't understand the question.

Q Where did you live? Where have you been for two years; where have you stayed?

A (No verbal response) -

Q Were you with Janet Mandeville?

A No.

Q Okay. At all, continuously, for the last two years prior to her death?

A Yes.

Q You were with her in the last two years prior to her death?

A Yes.

Q That would be from July of 2000 to July of 2002. Were you with your wife in 2002 at all?

A I believe so, yes.

Q Okay. When would that have been?

A I don't know the clear -- the dates exactly.

Q What do you remember about being with her in 2002? That's the year she passed away.

A The year she passed away?

Q Yes, sir, 2002.

A I have no - I don't have a clear recollection of that.

Q So you don't remember whether you were with her in the year 2002; is that your answer?

A No.

Q No, that's not your answer?

A No.

Q Okay. What is your answer?

A I said, I don't have a clear recollection of it.

Q So, you don't have a clear recollection of whether you were with your wife in the year of 2002; do I have that right?

A Correct.

Q Okay. Do you have any recollection of being with your wife in the year 2001?

A I believe so.

Q Okay. What do you recall?

A Riding snowmobiles in the backyard.

Q Can you tell US what time of year that would have been?

A Christmas.

Q Okay. And that would be Christmas of 2001?

A I'm not sure.

Q Or Christmas of 2 -- or the winter before that, which would be 2000?

A I'm not sure.

Q Okay- So you're not sure if you' were with Mrs. Mandeville in December of 2001 or December of 2000; is that correct?

A Correct.

Q All right. At this time you were snowmobiling with her in the backyard, was anyone else present?

A Yes.

Q Who else?

A Norman Scott, Jr.

Q I beg your pardon?

A Norman Scott, Jr.

Q Norma Scott, Jr.?

A Norman Scott, Jr.

Q Oh, okay. Is Mr. Scott a relative or a friend of the family?

A Yes.

Q Which?

A Friend of the family.

Q I see. Do you know where he resides?

A No.

Q Do you know if he lives in the state of Michigan?

A No.

Q When is the last time you spoke with Mr. Scott?

A (No verbal response)

Q Sir?

MR. CASHEN: Well, if you remember, you can tell him that.

BY THE WITNESS:

A I believe it was last week.

Q Okay. And how is it you came to speak to him last week?

A He called me.

Q Okay. And where were you when you received that phone call?

A (No verbal response)

Q Where were you?

A Where was I?

Q Yes.

A In the U.S.

Q Okay. Can you be more specific as to which state?

A State of Michigan.

Q You were in Michigan, it was last week, okay. Have you talked with him at all regarding this case?

A Yes.

Q Does Mr. Scott live in the state of Michigan?

A I've answered you that I don't know.

Q Oh, okay. At the time you were snowmobiling with him, was he invited that day, or did he just show up, or was he already there when you arrived?

A I don't remember.

Q Is it your intention to call Mr. Scott as a witness in this case?

A It's not my job.

Q So you don't know, okay. Besides this time you were snowmobiling with Janet Mandeville, either in December of '01 or December of 2000, when is the last time prior to that, that you saw her?

A I don't remember.

Q Could it have been more/less than a year?

A I don't remember.

Q Your lawyers have stated, in various court papers, that the last time you saw your wife, Janet Mandeville was January 8, 2001; is that inaccurate?

A I don't know.

Q It's also been stated by your lawyers that you were continuously absent -- not with, I should say, Janet Mandeville for at least 18 months prior to her passing in July of '02; is that correct?

A I don't know if that's an accurate figure.

Q Is it an approximate?

A Yes.

Q All right. It's also been stated on your behalf that you had, during the last 18 months of Janet Mandeville's life, infrequent contact with her; is that true?

A In the 18 months?

Q Yes.

A 17 months?

Q Yes.

A Yes.

Q All right And I understand, according again to the court papers, that the contact consisted of a few phone messages back and forth, but you actually never spoke with one another; is that also true?

A Correct.

Q Have you lived at an address on Commerce Boulevard in Chesterfield, Michigan?

A Define "lived."

Q Stayed at, used as a mailing address

A Yes.

Q Okay. That would be 30505 Commerce Boulevard in Chesterfield?

A That may be the address.

Q Okay. Whose home is that?

A I don't know that it is anyone's home.

Q What did you use that home for?

A I said, I don 't know if it is someone's home.

Q Your court paper, sir, listed that as your

address. I'm trying to find cut, did you live there; did you stay there; do you get your mail there, or is that an untrue address for you?

A Which question do you want answered?

Q All of them, take your pick.

A You have to start over at the beginning, then, and ask them.

Q. Okay. Do you live at -- have you lived at 30505 Commerce Boulevard in Chesterfield?

A I have slept there.

Q Okay. And whose house -- who owns that residence?

A I don't know.

Q Who stays there with you when you sleep there? A No one.

Q Is that a single family home, an apartment, or a condominium?

A None of the above.

Q Okay. What kind of a dwelling is it?

A It's a plastics plant

Q I beg your pardon?

A Plastics plant

Q Oh, it's a commercial building of some kind? When you say "plastics plant," I'm thinking a factory of some kind.

A Correct I don't know the zoning, but it is a factory.

Q Okay. And you have slept there?

A Yes.

Q Okay. Who owns that plant?

A Again, I don't know.

Q What gave you the legal right to sleep there?

A I'm not interested in legal right to sleep there?

Q You had the owner's permission to sleep there?

A No.

Q You trespassed on the property and just slept there; is that correct?

A No.

Q Well, then how is it you came to sleep there?

A (No verbal response)

Q Sir, your lawyer will object if there's a basis for it. You don't have to look to him for every answer.

MR. CASHEN: He can look to me how

often he wants, Counsel. I'm -going to guess, at this time I'm going to object to the relevancy of who owns that residence and instruct the Witness not to answer. "If you want to make a list and take up things with the judge later, and explain the relevancy, well, then we can certainly do that.

MR. MALACH: .Okay. "

MR. CASHEN: I don't see what point it has, to inquiring into his personal affairs and how that's relevant to this litigation, it's purely harassment.

MR. MALACH: The relevancy of the questions just to make a proper record for the Court later on, is: Mr. Mandeville has claimed that he was not willfully, continually absent from Janet Mandeville. And to do so, I think it relevant to inquire where he has been living and who he has been staying with over the last two years. I think it's very relevant

MR. CASHEN: For purposes of our Record, it's already been set forth in pleadings, which are binding on us, that there was a physical absence for 17 or 18 months prior to her death. Whether that constitutes willfully absent under the statute is a

matter of legal argument. There is not a dispute that he was not physically present with the decedent for more than one year prior to her death, therefore, none of those questions are relevant.

MR. MALACH: Okay. Well, we think they are, because he then would assume that he still stays married, and I don' t know who he has been with and whether or not that would constitute what the Court or the trier of fact may ultimately decide to be your position insofar as his spousal' rights are concerned, so I'm going to keep revisiting the issue.

BY MR. MALACH:

Q Do you have mail sent to the Commerce Boulevard address in Chesterfield, sir?

A Yes.

Q Okay. Do you pick up your mail there?

A Yes.

Q Who do you pick your mail up from, what person?

A No person.

Q How is it you pick up your mail then?

A I pick it up; it's laying on a desk.

Q You have a key to this building?

A Yes.

Q Okay. And you're free to come and go as you see fit?

A Yes.

Q Does anyone else - is anyone else ever there while you're there?

A Yes.

Q Okay. People work there; it's an open plastics factory or a closed plastics factory?

A Open.

Q It's open for business. What's the name of the factory'?

A I don't know what the legal name is.

Q Okay. What do you know it as?

A Supreme.

Q I beg your pardon?

A Supreme.

Q Supreme Plastics? Supreme anything, just Supreme?

A That's what I know it as.

Q Okay. Are you familiar with any of the people

that work there?

A How do you mean, familiar?

Q Do you know them?

A How?

Q Do you know them?

A I know you, I'm not familiar with you.

Q Do you know any of them?

A Yes

Q Okay. Who is it you know there?

A Todd, Cary, Steve.

Q Do you know any of the people you just described, their last names?

A Yes.

Q What are they?

A Dereadt

Q I beg your pardon?

A Dereadt.

Q Can you spell that, please, for the court reporter, best you know?-

A D-e-r-e-a-d-t.

Q Okay. And that would be, all their last names are the same?

A No.

Q Whose last name is that?

A Todd Dereadt.

Q Okay. What is Todd's relationship to Supreme?

A I don't know.

Q Does he work there?

A I assume.

Q Okay. How is it you know him?

A He's my cousin.

Q I see. And the other two names you mentioned are, again, who?

A Cary and Steve.

Q Okay. Do you know Cary's last name?

A No.

Q Do you know Steve's last name?

A No.

Q They are other people, though, that also work there?

A They work there.

Q Do you happen to know who owns this place that you stay at occasionally?

A No.

Q Do you know an address 14105 Rocco Court, in Utica?

A I think so.

Q Okay. And how do you know that address, sir?

A It's a plastic plant or was a plastic plant.

Q Okay. And that has something to do with Todd Dereadt as well?

A Yes.

Q His last name you spelled D-e-r-e-a-d-t?

A I believe so.

Q Did he have a wife named Deborah?

A I think so.

Q Have you ever stayed at that residence, that address, on Rocco Court?

A I don't remember.

Q Do you know a Diane and Bill Prezimski (ph); do you know that name?

A Yes.

Q How is it you know that name?

A They work for me.

Q I beg your pardon?

A They worked for me.

Q And what did they do for you?

A They work in plastic plant.

Q You owned a plastics plant?

A I was a stockholder.

Q Oh, I see. What was the name of that company?

A Seville Enterprises.

Q Does that company still exist?

A Negative.

Q Okay. Do you have occasion to' ever stay with Diane and Bill Prezimski --Prezimski?

A Not that I remember.

Q Have you ever been to the address of 15055 32 Mile Road in Romeo?

A Yes.

Q Okay. And how is it you know that address?

A That was where I worked at a plastics plant.

Q Okay. Do yon know the name Rich, either "Knill" or "Nill"? K--I-l-l.

A I think I do.

Q And how is it you think you know that name?

A I believe that be was one of the partners that

purchased the building at 15055 32 Mile Road.

Q In the last two years, have you lived in Louisiana, in New Orleans?

A Have I slept there?

Q Yes.

A Yes.

Q Okay. With who?

A With who?

Q Yes.

A I have no clear recollection.

Q What kind of place is it that you stayed there?

A I have no clear recollection. Probably hotel/motel, whatever.

Q Nothing on a permanent basis?

A Negative.

Q And never with anybody else?

A Not that I recall.

Q Do you know an address of 141 East Robert Lee Boulevard in New Orleans?

A Yes.

Q And how is it you know that address, sir?

A It's a mailbox.

Q I beg your pardon?

A Mailbox.

Q Oh, like a P.O. box?

A (No verbal response)

COURT REPORTER: Is that a yes?

(Witness nodded head)

BY MR. MALACH:

Q You would have mail sent there?

A Yes.

Q Why?

A I'd want it sent there.

Q You were living there at the time that you had the mail sent there?

A No.

Q Where were you living?

A I don't know.

Q You don't know. Have you ever lived in Las Vegas in the last two years?

A Last two years?

Q Yes, sir.

A No.

Q Do you know a name Ly Lan, L-y L-a-n?

A No.

Q Are you familiar with an address at 4566 Spring Mountain Road in Las Vegas?

A Yes.

Q How is it you're familiar with that address, sir?

A Post office box.

Q And you had mail sent there?

A I believe so.

Q But you did not live there?

A Not that I recall.

Q Where were you living when you had your mail sent there?

A I don't remember.

Q Do you know the name Janice Bendure B-e--d-u-r-e?

A No.

Q Does the name Teresa Louise Lawson strike a bell?

A Yes.

Q How is it that that name is familiar to you,

sir?

A I knew her a number of years ago.

Q How is it that you knew her?

A I don't understand.

Q Work -- work or social?

A Social.

Q Okay. Did you ever stay with her?

A I don't remember.

Q Did you ever spend the night with her? A I don't remember.

Q Do you know the address 23608 Marlborough in Mount Clemens?

A No.

Q How long have you known Ms. Lawson? Is it Miss or Mrs. Lawson?

A I donlt know.

Q How is it you know her?

A I don't remember, it was a long time ago, social.

Q When you say "a long time ago," is that more than 10 years ago?

A Possibly.

Q More than 20 years ago?

A I doubt it.

Q Okay, so somewhere from 0 to 10 years ago; is that a fair statement?

A No, I don't make that type of statement.

Q Do you know where Ms. Lawson lives now?

A No.

Q When is the last time you had contact with Ms. Lawson?

A I don't remember.

Q When was the last time you stayed the night at the 24 Mile Road residence?

A I don't remember.

Q When was the last time, prior to your wife's passing, that you came to the house on 24 Mile Road, before her passing?

A I don't remember. I have no clear recollection of when exactly.

Q Do you know approximately?

A No.

Q When was the last time you had a phone conversation with Janet Mandeville?

A I don't remember exactly when.

Q When's the last time you sent any money to Janet Mandeville?

A I don't remember.

Q When is the last time Janet Mandeville sent any money to you?

A She never has.

Q When is the last time you sent any documents, mail or other papers, to Janet Mandeville?

A I couldn't give you dates.

Q Can you be -- was it within the last two years of her death?

A Two years or one year?

Q Two years.

A Probably.

Q Okay. What about one year?

A No.

Q Okay. Let's talk about the second year, then, where your answer was "probably,' what do you recall about the papers being sent?

A There were a massive amount of papers at one point.

Q That you sent to her or she sent to you?

A We were both obtaining and looking at.

Q So there was a lot of back and forth of papers going on between you?

A Yes.

Q Approximately, give or take, two years prior to her passing?

A Yes.

Q Where were you staying then?

A At the house on 24 Mile Road.

Q I see. What kind of papers were these, by the way?

A Legal and financial documentation.

Q This has to do with that Seville Company and some other things?

A Yes, yes.

Q Your bankruptcy, some things like that? The company bankruptcy, I mean.

A Yes.

Q Can you tell me, within the last two years of her passing, did you exchange any e-mails between you?

A Negative.

Q And I thought I -- I just want to verify, in the last one year prior to her passing, you had no actually talked on the phone with her?

A No.

Q Is that correct?

A Correct.

Q Can you tell me the-last time you slept in the house prior to her passing, which would have been in July of 2002?

A Just like the last time you asked: no.

Q Okay. Can you tell us the last time you had sexual relations with Janet Mandeville before her passing?

A No.

Q Would that have been at least beyond one year of her passing?

A I would assume.

Q In the year prior to her passing away, did you have a cell phone?

A Yes.

Q Was it operating -- operating and fully

operable during that whole one year prior to her passing away?

A I don't know.

Q Did there come a time during that one year where you had the phone turned off, or it was turned off?

A Yes.

Q Do you know when that would have been?

A No.

Q Do you know why that would have been?

A Yes.

Q Why?

A Did not pay the bill.

Q Where were you living when that occurred?

A I don't remember.

Q But you remember you didn't pay the bill; where was the bill being sent?

A I don't know.

Q Where was your mail going at this point in time?

A I don't remember.

Q I don't know if I asked you, what do you do for

a living?

A Nothing. I am not working at the present time.

Q During the one year prior to your wife's passing away, what did you do, your occupation?

A My occupation?

Q Yes, sir.

A I'm a mold maker.

Q I beg your pardon?

A I'm a mold maker, I build plastic injection molds.

Q Oh, okay.

A At least, I was.

Q All right. And the year prior to your wife passing, where were you working as a mold maker?

A I wasn't.

Q Were you working anywhere?

A I don't remember.

Q You don't remember?

A No.

Q Do you remember the year before that, in the

year 2001, where you were working?

A No-No clear recollection of it.

Q Do you have any tax papers in your possession any 1099's?

A None.

Q Did you file for taxes?

A No.

Q Did you work in the United States?

A Possibly.

Q Possibly/possibly not?

A Possibly not.

Q How would you recall that, sir? What would make you refresh your recollection?

A I don't know, and I don't know.

Q From the last time you lived at the house on 24 Mile Road did you take your clothing and other personal -- some of your clothing, or most of your clothing out of there?

A When?

Q I want to know -- we'll get to that in a minute.

A Okay, then I don't -- then I don't have any clear recollection of it.

Q Okay. Did you ever take your clothing out of the house?

A Continuously.

Q Why?

A So I had clean clothes to change into.

Q You didn't live there, is that correct, on 24 Mile?

A I don't know -- I don't know what date you you're talking about.

Q In the last one year prior to your wife's passing.

A No.

Q In the year prior to your wife passing, did you have any joint bank accounts with her?

A Not that I know of, she may of.

Q Okay. Did you work in the one year prior to your wife's passing?

A I have no clear recollection.

Q How did you support yourself if you can't recall if you were working, sir?

A I don't remember.

Q Were you ever ordered by Janet Mandeville, or

a court, to leave the 24 Mile residence, to not live there?

A No.

Q You did that of your volition your own--

A Yes.

Q Voluntarily, I meant. In the year prior to Janet Mandeville passing away, did you list her as a beneficiary on any insurance, or retirement, or any other accounts?

A I don't remember.

Q Did you date any other women in the one year prior to Janet Mandeville passing away?

A. I don't remember.

Q Did you change any beneficiaries or change any bank accounts that you had with Janet Mandeville for the one year prior to her passing away?

A No.

Q Did you establish any new bank accounts during the one year of her passing away or any brokerage accounts, or any other financial type accounts?

A No.

Q Do you have any bank accounts, joint with others?

A No.

Q Do you even have a bank account?

A I'm not sure.

Q Or a credit union account, or any other financial type accounts?

A No, no, possibly?

Q Okay. Do you have a passport?

A Yes.

Q In your possession? Not today, but in your possession, available to you?

A No.

Q Why not?

A Don't know where the things are.

Q When did you learn of your wife's - I'm sorry - of Janet Mandevillers illness?

A I don't remember exactly.

Q Was it within the one year of her passing away, or afterwards?

A Neither.

Q So it was beyond -the one year?

A No.

Q What do you mean then?

A I mean what I said, I answered your question: no.

Q You don't remember if you knew of her illness within one year of her date of death?

A I knew of it, yes.

Q How is it you knew of it?

A Because she was sick before then.

Q How long before then?

A I don't know totally.

Q Months earlier, years earlier?

A Years.

Q Years earlier, she was sick. And how is it that you learned that she got sick again?

A I learned from my cousin, in e-mail, that she had passed away.

Q I see. So you weren't aware that she had gotten sick again; correct?

A No, she was Still sick from the same thing.

Q Yeah, but by the time you learned all this, she

had already passed away?

A Yes.

Q Okay, so you learned after the fact. What I'm asking you is, did you know at the time that she was sick, that she was sick?

A Yes.

Q Okay. Years earlier?

A Yes.

Q Okay. Were you aware of her type of treatment she was going through immediately prior to her -- to Janet passing away?

A No.

Q You weren't advised of her passing away at the time it occurred; is that correct?

A Correct.

Q Do you know why?

A No.

Q Do you know where you were living at the time?

A No.

Q Can you tell us why is it you don't recall where you were living at the time?

A No.

Q Did you attend her funeral?

A No.

Q Did you have anything to do with the

arrangements at the Young Funeral Home?

A No.

Q Had you provided Janet, or anyone else, with a way of locating you?

A Yes.

Q Who is it you provided that information to?

A An attorney.

Q What attorney would that be?

A Gary Cunningham.

Q When did you provide him that information?

A How many years ago?

Q If it was years ago, years ago.

A Years ago.

Q Okay. And what information did you provide him?

A E-mail address, telephone number.

Q That would be that cell phone?

A Same one.

Q The one that got disconnected for not paying the bill?

A For one month only, yes.

Q Do you know what month that would have been, sir?

A No.

Q Did you happen to pay any of Janet Mandeville's medical bills.

A No.

Q -- in the last one year prior to her passing?

A No..

Q Did you make any of the mortgage payments on the house within the one year of her passing?

A I have not seen any of the paperwork for any of the things you are describing now.

Q Okay. Well, you would know if you made the payment. Did you make any of the payments?

A No.

Q Okay. Are you at the moment a party to any other pending lawsuits'?

A No.

Q Have you, in the last three years, been a party to any other lawsuits except those involving the Seville Plastics?

A I'm not sure.

Q What gives rise to you to conclude you're not sure?

A Attorneys' definitions.

Q Have you been sued?

A I'm not sure.

Q Did you receive court papers from anyone?

A Continuously.

Q Like where; like who?

A Would you like to ask me a question I can answer?

Q Sure.

A Well, ask one.

Q Sure. What kind of papers, court papers, did you see?

A A variety of court papers in attorneys' filings.

Q Can you describe any of them?

A Not accurately.

Q As best you can recall, what do you -- what do you remember?

A It involved personal guaranties on the company.

Q Okay, that all comes out of the Seville?

A Yes.

Q Anything outside of the Seville situation that you've been involved in legal proceedings with, except in this case, of course?

A No.

Q All right. Have you sued anyone in the last two years for anything?

A No.

Q Are you presently a member or an owner of any business?

A No.

Q In the last two years, were you a member or

owner of any business?

A I'm not sure. You're back to Seville again?

Q Other than Seville.

A Other than Seville -- yes. there's more companies involved than just Seville.

Q What are the names of the companies?

A Grenada (ph) Industries.

Q I beg your pardon?

A Seville Enterprises, Formation Products.

Q Who's Jennifer Wilson?

A I don't know.

Q You have no idea? Who are Frank and Diane Scott?

A They're friends of the family.

Q Have you talked with them about this case?

A Yes.

Q What have you said to them?

A There's been extended conversations that would take hours to recount. If I tried to remember all of it, I wouldn't be accurate.

Q Would these conversations be in person or a different type of communication?

A Yes, yes.

Q So that answer is: in person and other types of communication; right?

A Yes.

Q What other types of communication besides in person did you have with the Scotts?

A Telephone.

Q I see. When is the last time you spoke with the Scotts?

A Which?

Q Frank

A There is no Frank Scott that I know of.

Q Is there a Diane Scott?

A Yes.

Q And who is she married to?

A Norman, Sr., I think.

Q And when is the last time you spoke with Diane?

A Last week.

Q What was the nature of the conversation?

A (No verbal response)

Q Sir?

MR. CASHEN: If it's related to the case, I think you can answer it. If it's something not related to the case, that you think is private, then you don't have to answer it.

THE WITNESS: Okay

BY MR. MALACH:

Q That's fair. Sir, anything to do with the case,

this conversation you last had with Diane Scott?

A No.

Q Okay. And you say the husband's name is Norman, Sr.?

A I think, yes.

Q All right. Whenls the last time you spoke with Norman, Sr.?

A Last week.

Q Okay. Have anything to do with this case?

A Yes.

Q Okay. What was the nature of the conversation you had with him?

A Discussing attorneys' personalities.

Q I see. By the way, where do they live?

A I don't know.

Q Do they live in the state of Michigan?

A Probably.

Q This conversation you had with them, was it in person?

A No.

Q Over the telephone?

A That's what I said, yes.

Q Okay. Did you call them?

A Yes.

Q Where were you when you called them?

A I don't remember.

Q And you called them at home?

A Yes.

Q But you don't know where that -- that is; you just have their number, you know their number?

A Correct.

Q How do you know their number; do you have it memorized?

A No.

Q Where is their nmnber listed?

A I haven't the slightest idea where it's listed.

Q How did you find their number to call them last week?

A She called me on the cell phone and I just pushed returned the call.

Q I see. What is your cell phone number, by the way?

A I don't know, 5-0-4 something.

Q What company is it through?

A Sprint.

Q And in whose name is the phone?

A Frank Mandeville, Jr.

Q You understand that there has been an agreed upon court order entered that authorizes the retrieval of certain items from either the 24

Mile Road residence or the cabin; you're aware of that?

A No.

Q What is it -- well, if you're not aware of it, never mind

A Nothing about a cabin. 24 Mile Road Macomb County, upon reasonable notice -- nothing about the cabin.

Q Okay.

A I received it today.

Q So all the items -- you're looking at the court order, I assume, which, I believe it includes a dresser and contents, chest of drawers. Where are those things located, if you know?

A. I don't know for sure now. I have not seen them recently.

Q What do you mean by that? Let's break--

A I mean, I don't know for sure. What part of "I don't know" don't you understand?

Q What dresser are you speaking of?

A I'm not speaking of a dresser. This is paperyvork that was given to me, not that I gave to someone else.

Q Oh, you didn't give this, the description of a dresser and contents, to your lawyers?

A I may have months ago, but I don't remember

it.

Q Okay. Or the chest of drawers that's listed there, too, you don't know what that means?

A Well, I know what a chest of drawers was, and I know where it was, but you asked me, "Where is it?" and I don't know.

Q Okay. Where was it?

A It was at 24 Mile Road.

Q In what room, if you recall?

A One of the small bedrooms.

Q Okay. And what was in the chest of drawers, if you recall?

A I don't recall.

Q Is it wood, this chest of drawers, if you recall?

A I believe so.

Q All right. The dresser and contents above that, the last you recall, where was that located at the 24 Mile Road residence?

A There was one in the basement.

Q Okay. And the paper I saw says "contents." What kind of things are in that dresser, if you recall?

A I don't recall all.

Q What kind of things?

A Personal things.

Q Can you be more specific?

A No.

Q The court paper also talks about some clothing of yours. Do you know, the last you saw, where that would have been located?

A In a closet.

Q Which closet?

A The one on 24 Mile Road or the one in the cottage?

Q Wherever you say your clothing is, sir. You told me it was just 24 Mile Road, so I guess that's all we're talking about

A No, that's not accurate, that's not what I told you.

Q Okay, then why don't you clarify what you meant by clothing.

A Things that you wear on your body.

Q And where are they located?

A I don't know now.

Q Where were they located?

A They were located in a closet on 24 Mile Road and also a-closet in a cabin, Rose City.

Q Do you know which closet in the 24 Mile Road residence they were located?

A Yes.

Q Which closet would that be?

A A small bedroom, a hall closet.

Q And in the -- you say there's also clothing in the cabin?

A There was.

Q The last you saw,where was that located?

A In a closet, in some drawers.

Q Was there more than one closet in the cabin?

A Yes.

Q Which closet are you referring to then?

A The small bedroom on the right hand side when you entered.

Q All right. The desk with loading equipment, the last you recall, was located where?

A In the basement, 24 Mile Road.

Q What is "loading equipment"?

A (No verbal response)

Q What is it?

A Equipment for loading.

Q Loading truck; loading what?

A Ammunition.

Q Oh, a weapon of some kind, okay. And the guns and ammo referred to on that same paper would be located where, sir, last you recall?

A In the house at 24 Mile Road.

Q The last you recall, where in the house on 24 Mile Road?

A In a variety of places.

Q Can you tell us what type or amount of weapons, or guns and ammo that you're speaking of here?

A No.

Q More than two guns?

A You're considering 24 Mile Road, or also the property in Northern Michigan?

Q Well, we'll do them one at a time. At 24 Mile Road.

A I don't remember how many.

Q More than six?

A No.

Q Less than six?

A I would say so.

Q Okay. And what about in the - this cabin up north, is it a trailer, or is it a free standing, on-the-ground cabin?

A The one I'm referring to is a trailer.

Q Okay. And that would be on the up north property?

A Yes.

Q All righty. And how many guns were located in that -- or last you recall, were located in that dwelling?

A I don't remember.

Q More than two?

A Probably.

Q More than six?

A I don't know, I don't recall.

Q More than five?

A I don't know, I don't recall.

Q In the one year prior to your wife passing, why didn't you have your mail sent to the 24 Mile Road address?

MR. CASHEN: Was that since the date of his wife's passing?

MR. MALACH: Prior.

MR. CASHEN: Prior to.

MR. MALACH: Right, July '01 to July '02, call it.

BY MR. MALACH:

Q Why didn't you bave your mail sent there?

A Very little mail was ever sent there.

Q Why not?

A Because of business concerns.

Q I don't understand What do you mean by "business concerns"?

A So that personal guaranties and personal liabilities would not be followed back to the home.

Q I see. Were there any e-mail communications benveen you and Janet Mandeville for the one

year prior to her passing away?

A No.

Q Is it true that, in the past, you had signed certain documents as it relates to waiving any spousal' rights you may have at your wife's Comerica savings plan?

A No, I don't remember doing anything like that.

Q Is it true that, in the past, you had signed papers authorizing termination of your insurance coverage that would have been provided through Janet Mandeville's employment?

A No.

Q That's not true?

A That I signed paperwork terminating that? Not that I remember, I was never presented with paperwork.

(WHEREUPON, Deposition Exhibits Number One and Two were marked at 3:20 p.m.)

BY MR. MALACH:

Q Let me show you what has been marked for identification purposes, only for this deposition, as Exhibit Number One, and ask you to share that with your lawyer for a minute, let me know when you're finished

looking at it, and I'll ask you some questions.

MR. CASHEN: Do you have any idea of the date of this?

MR. MALACH: That's what I'm about to ask him.

BY THE WITNESS:

A No, I don't remember signing it There is no date on it, so --

Q Does that appear to be your sjgnature, sir?

A It appears to be.

Q Then, let me show you also what's been marked, for deposition purposes only, as Exhibit Number Two, and ask you to take a look at that, let me know when you're done looking at it. Are you done looking at it?

A I am.

Q All right.

A Yes, sir.

Q Do you recall signing this document?

A No.

Q Do you see it's dated August 31, 1994?

A Yes.

Q You see it purports to bear your signature in front of a notary, does that appear to be your signature?

A It appears to be, yes.

Q Do you recall signing this?

A No.

Q. Do you deny that you signed this?

A No.

Q Do you know why you signed this, or under what circumstances you signed this?

A I didn't say I did sign it.

Q I beg your pardon?

A I did not say I did sign it.

Q Does that appear to be your signature?

A That appears to be my signature.

Q Do you recall signing it?

A No.

Q All right. So if you don' t recall signing it, then you don't recall why you would have signed it; right?

A No, no.

Q Okay.

A Nine years ago.

Q All right. Does the name Robert Males, M-a-l-e-s, strike a bell?

A No.

Q Or Moles, M-o-l-e-s?

A No.

Q Does the name Rhonda Lynn Gallagher strike a bell?

A No.

Q Do you fly a helicopter, sir?

A Not at the present time.

Q Do you have a license to do so?

A Yes.

Q Have you been engaged in that occupation in the last year-and-a-half, prior to Janet Mandeville passing away?

A I have no clear recollection of it.

Q Do you recall -- recall whether you had an occasion to be flying a helicopter, being paid to do so, in the Philippines, in the last -

A I don't recall.

Q You don't recall, okay. Does the name Dr. Kimberly Less mean anything to you?

A No.

Q Do you know the name Gary Cunningham?

A Yes.

Q I believe that's the attorney you mentioned earlier?

A Yes.

Q All right. And I recall your saying that's the attorney that you provided information insofar as locating you, communicating with you is concerned; is that correct?

A Janet and I both did, yes.

Q Okay, but you didn't provide tbat information to Janet, you provided it to Mr. Cunningham; correct?

A We both provided it to Mr. Cunningham, Janet also had it

Q Prior to Janet Mandeville passing away, when is it you had communicated whatsoever with Mr. Cunningham?

A I don't remember.

Q Would it have been within the one year prior to Janet Mandeville passing away?

A Yes.

Q What was the nature of the cormnunication?

A I don't remember.

Q What was the content of the communication?

A. I don't remember.

Q You say you had a communication?

A Yes.

Q What do you remember about that whatsoever?

A That he was attorney acting for Janet and myself, to represent us and defend any personal liabilities against -- liabilities that may be placed against us from Seville Enterprises, Grenada (ph) Industries.

Q Was that a communication in person.

A No.

Q -- between the two of you?

A No.

Q Was it over the telephone?

A Yes.

Q Were you in the state of Michigan during the course of that telephone conversation, or outside the state of Michigan?

A I don't remember.

Q Did you ever meet Gary Cunningham prior to Janet Mandeville passing away?

A Yes, many times.

Q Does the name Beverly Fernary (ph) strike a bell?

A Yes.

Q How is it you know that name?

A A friend of the family, I believe.

Q I see. And do you know where she presently resides?

A No.

Q Can you tell us when the last time you communicated with Miss - is it Miss or Mrs. Fernary?

A I don't know.

Q Okay. Can you recall the last time you communicated with her?

A No.

Q Was it this year?

A Yes.

Q Do you know what state she lives in?

A No.

Q Do you know where she works?

A No.

Q Do you have any way of contacting her?

A Yes.

Q How is that?

A Probably telephone.

Q Do you have her phone number?

A No, but my attorney does.

Q Okay. Do you know the name -- I'm sorry, back up -- did you talk to Ms. Femary about this case since its occurrence?

A (No verbal response) Q Sir?

MR. CASHEN: If it relates to the case) you can tell him.

BY THE WITNESS:

A Yes.

Q And what was the nature of your conversation with her about this case?

A What individual part?

Q Whichever part you recall first.

A I don't recall anything specifically.

Q Okay. What do you --

A If I tried to, it wouldn't be accurate.

Q What is it you do recall?

A Talking to her just about the case.

Q Okay. I believe you have indicated you are objecting, contesting to Janet Mandeville's estate plan that disinherit you, is that correct; is that your understanding?

THE WITNESS: Is that correct?

MR. CASHEN: Yes.

BY MR. MALACH:

Q If you know

A Yes.

Q Okay. Is that, in part, based on any communication you've had with Beverly Fernary?

A No.

Q Do you know the name Thomas Cavanaugh?

A I've heard it.

Q Okay. How is it you've heard it?

A I don't remember.

Q Okay.

A It may be one of the attorneys, accountants, God only knows.

Q Okay. Could be an attorney, okay. As a matter of fact, sir, just so you're aware, that's a

witness and the drafter of Janet Mandeville's estate plan.

A Okay.

Q And the reason I mentioned that to you, a follow-up question. Did Mr. Cavanaugh give you a letter that Janet had signed?

A Yes.

Q Okay. When did you receive that letter?

A When he gave it to me.

Q When would that have been?

A I can't give you an accurate time.

Q It was after Janet passed away?

A Yes.

Q Where did that take place?

A I believe, in Gary Cunningham's office.

Q Do you have that letter?

A No.

Q Did you read that letter?

A I don't remember.

Q Do you remember what the letter said?

A No.

Q How do you know it was a letter?

A I don't, I assumed -- you said it, so I assumed.

Q Okay. What do you remember; were you handed an envelope?

A Yes.

Q Do you know what was in the envelope?

A No.

Q Do you recall reading anything inside the envelope?

A No.

Q Do you have the contents of the envelope any more?

A I do not have it presently.

Q Do you have it in a place; do you have it secure somewhere?

A I do not.

Q Who would?

A I don't know.

Q If you don't have it, where would it be, sir?

A I wouldn't know.

Q You said you don't have it?

A That's right. So if I don't have it, how would I know where it is?

Q Then you don't know its location; is that correct?

A Not at the present time.

Q Okay. Did you keep it?

A Yes.

Q You just don' t know where you kept it; is that a fair statement?

A No.

Q What is a fair statement, then, as to its present location?

A I don't know.

Q You just don't remember where it is, but you have it?

A I said, I don't know where it is.

Q Okay. You don't remember what it says either, is that also your testimony?

A No.

Q What is your testimony about the contents of that envelope?

A I don't have any.

Q You have no recollection as to what it said?

A I'm sorry, I can't answer that.

Q You received -- let me back up -- did you receive an envelope from Thomas Cavanaugh?

A Yes.

Q Did you look at its contents?

A No.

Q You never opened it?

A No.

Q No, you never opened it? I just want to make it clear for the Record.

A I've already answered that.

Q I beg your pardon?

A I answered you.

Q I don't understand your answer, then, sir. Did you receive an envelope?

A Yes.

Q Did you open it?

A No.

Q You received a sealed -- a sealed envelope?

A Yes.

Q And you never opened it?

A Do you want me to write the answer down?

Q Pardon?

A Do you want me to write it down so I don't have to keep repeating it?

Q If that helps you out, sure, whatever it is --

A It doesn't help me out, so I won't thank you.

Q Did you receive the envelope?

A Yes.

Q Did you open it?

A No.

Q Did you put it somewhere?

A No.

Q Do you still have it?

A No.

Q Did you throw it away?

A No.

Q Was there a letter inside?

A I don't know; I did not open it.

Q. Okay, fair enough. Did you happen to give this envelope from Mr. Cavanaugh to someone else?

A Yes.

Q Okay. Who was it you gave it to?

A The gentleman's name is Mark.

Q Do you know Mark's last name?

A Booth (ph).

Q I beg your pardon?

A Booth.

Q And why is it you gave this envelope to Mark Booth?

A So it would be secure.

Q Okay. You trust Mark Booth?

A Yes.

Q And you gave him this because it's an important document, correct, or so you think? You don't know, because you haven't read it yet; right?

A It's important to me.

Q That's fair enough. Who is Mark Booth?

A It's a man.

Q Okay. How do you know him?

A I've known him for a long time. I don't remember where I first met him.

Q Okay. When is the last time you

communicated with Mr. Booth?

A Maybe a year.

Q Okay. Where does Me Booth live?

A I don't know.

Q Where does Me Booth work?

A I don't know.

Q If you were to communicate with him now, how would you locate him?

A I wouldn't, he locates me.

Q How is it that he locates you?

A It's his problem, not mine.

Q You gave him something to hold for you; correct?

A A number of things.

Q What else did you give him?

MR. CASHEN: Unless it relates to Janet, I don't know why he should answer this.

MR. MALACH: I don't know until he tells me what it is. I know this does.

BY THE WITNESS:

A It doesn't relate to Janet.

Q Okay. Do you know what state Mr. Booth lives in?

A No.

Q When you gave him this envelope, where was -- where did that exchange take place?

A Michigan.

Q Okay. Can you be more specific?

A No.

Q It's a pretty big state. Were you at a phone booth; were you at a house; were you at a restaurant?

A No, no, no.

Q Where were you?

A I don't remember.

Q What else did you give him as it relates

A Nothing that pertains to Janet.

Q Okay. And what was he to do with this envelope that you gave to him?

A Keep things secure for me.

Q Okay. Until when?

A Until I would need them.

Q Okay. How is it he would know that if you can't locate him?

A He doesn't; he locates me.

Q I see. He has your cell phone number?

A Yes.

Q He has your e-mail number?

A Yes.

Q Have you communicated with him in the last one year?

A No.

Q Have you communicated with him at all since you gave him this envelope?

A Yes.

Q Okay.

A Well, yes.

Q How is it you communicated with him?

A Because it was less than a year when I gave it to him.

Q Okay. And that's the last time you communicated with him --

A Yes.

Q -- was when you handed him this envelope and whatever else you gave to him?

A Yes.

Q Were these other things, were they papers, or more than just papers?-

A They don't pertain to Janet.

Q Were they papers, or more than just papers?

MR. CASHEN: Objection, asked and answered. Unless it relates to, you know, the issues in our case, we're not going to provide that information.

MR. MALACH: I wanted-to know where these papers are, what one paper is, and anything else.

MR. CASHEN: No one said they were

papers.

MR. MALACH: Well, one is.

MR. CASHEN: The letter that you 'ye referring to, which I'm sure you can obtain from the attorney who drafted the letter.

THE WITNESS: There you go.

MR. MALACH: I don't know -- we're presupposing on the Record that an attorney drafted this letter, I don't know what it is.

BY MR. MALACH:

Q You have -- you have not read this, read whatever is in the envelope, I don't know if it's a letter or what it is, you haven't read it; correct?

A I've answered that.

Q My recollection is -- answer my question -- you haven't read - the contents of the envelope?

MR. CASHEN: The Record speaks for itself, the Witness answered the question.

BY THE WITNESS:

A I've answered that.

Q You don't want to answer the question again; is that what you're saying?

A I answered that.

Q You're not -- I'll ask. you the question- one more time, sir . You previously testified that

you did not read the contents of the envelope; is that correct?

A That is what I testified.

MR. MALACH: All right, I don't think I have anything further. - Thank you very much

(WHEREUPON, the Deposition was concluded at 3:40 p.m.)

* * * * *

STATE OF MICHIGAN

)ss

COUNTY OF OAKLAND)

I certify that this transcript, consisting of sixty-six (66) pages, is a complete, true) and correct record of the testimony of FRANK MANDEVILLE, JR. held in this case on May 28, 2003.

I also certify that prior to taking this deposition, FRANK MANDEVILLE JR. was duly sworn to tell the truth.

/s/ Leslee Statfield

LESLEE STATFIELD, CER 3615
Certified Electronic Recorder
Regency Court Reporting

3133 Union Lake Road, Suite A
Commerce Township, MI 48382
(248) 360-2145

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SUSAN TKACHIK
*Plaintiff*

vs.

File No:
Hon.

COMERICA INCORPORATED AND
ABN AMRO INCORPORATED
*Defendants*

---

BEEDING LEGAL GROUP, P.C.
By: JOHN M. BEEDING, JR. (P52697)
CHARLES M. PENZIEN (P56491)
Attorneys for Plaintiff/Counter-Defendant
85 North Main Street, Suite 200
Mt. Clemens, MI 48043
(586) 783-0.000

---

## AFFIDAVIT OF SUSAN TKACHIK

1. This affidavit is made upon my personal knowledge of the facts and circumstances contained herein.
2. I am competent to testify and if called upon to testify I can testify to the facts contained herein.

3. On July 13,2002, my sister, Janet Mandeville, died of complications related to breast cancer after a long and debilitating period of illness.

4. I provided care for Janet in the months prior to her death, and according to Janet, during the 18 months preceding her passing, Frank Mandeville did not visit Janet, speak to Janet on the telephone, e-mail Janet, or write to Janet.

5. Myself, Janet, and Frank Mandeville's mother all attempted to contact Mr. Mandeville as Janet's condition deteriorated, but we were unable to do so

6. Prior to her death, Janet informed me that it was her intent that Frank Mandeville receive none of her assets upon her death, and that she would be creating her estate plan accordingly.

7. Following Janet's passing, I contacted representatives of Comerica Incorporated ("Comerica") and ABN AMRO Incorporated ("ABN")/Standard Federal Bank and requested that Janet's benefit packages be disbursed to me in accordance with Janet's desire.

8. I then met with Sylvia Baker, the Vice President of Standard Federal's Human

Resource and Benefits division. At this meeting, Ms. Baker forwarded a copy of Janet's will and Living Trust to ABN's Chicago office.

9. During this meeting Ms. Baker also informed employees of ABN's Chicago office that Frank Mandeville had abandoned his marriage to Janet, and that his whereabouts were unknown in the year and a half prior to Janet's death.

10. ABN employees from the Chicago office advised me that ABN would not transfer Janet's benefit package until Janet's estate was probated, and that ABN would not assign the benefit package without a court order requiring them to do so.

11. Despite ABN's earlier assurances, on March 18, 2003, Kimberly Cook Johnson, a representative of ABN, wrote to my prior counsel and stated that ABN planned on assigning Janet's benefit package to Frank Mandeville. ABN apparently based this decision on the fact that Frank Mandeville did not waive his original beneficiary status in writing.

12. My prior council failed to inform me of ABN's change of position, while also failing to follow ABN's administrative appeal procedure.

13. I only became aware of ABN's decision when my current counsel received a copy of the earlier correspondence from ABN in October of 2004.

14. On numerous occasions, I have requested that Comerica and ABN provide me with copies of the procedures governing the benefits packages at issue, and both entities have refused.

/s/ Susan Tkachik
SUSAN TKACHIK

Subscribed and sworn to before me
a Notary Public on the 7th day of July, 2005

Notary Public Carole L. Craig
Macomb County, State of Michigan
My Commission Expires: 11/19/08

Janet E. Mandeville
20985 24 Mile Road
Macomb, Michigan 48042

June 28, 2002

Dear Sir or Madam:

Attached please find the Designation/Change of Beneficiary on Group Life Insurance form. It is my understanding that by executing this single form, I will change the Beneficiary of my 401(k), Pension Plan, Profit Sharing Plan, and any other account, retirement plan or life insurance maintained, sponsored, managed or otherwise held with Comerica Bank.

By executing this form, it is my intention to change the Beneficiary of all the above listed accounts, plans or policies that I own any interest in to: my sister, Susan Tkachik.

I am married at this time, yet I do not wish for my husband to receive any benefit from any of the above listed accounts, plans or policies with Comerica. It is

my desire that my sister, Susan Tkachik, receive any and all benefits from the above listed accounts, plans, or policies .

Very truly yours,

/s/Janet E. Mandeville
Janet E. Mandeville
373-54-1728

ABN·AMRO North America, Inc.

# Life Insurance Beneficiary Designation Form

Location _____ Employee # _____

## 1. Personal Information

| Name | Social Security number | Today's date |
|---|---|---|
| Janet E. Mandeville | 373-54-1728 | June 27, 2002 |

| Street address | City | State | Zip code |
|---|---|---|---|
| 20935 24 Mile Road | Macomb | Michigan | 48042 |

| Date of birth | Date of hire | Sex |
|---|---|---|
| 8/20/50 | 9/1/95 | __M X F |

## 2. Beneficiary Designation

**Primary Beneficiary**

Indicate the person(s) whom you designate to receive the proceeds from your Basic (and Supplemental, if chosen) Life Insurance and Accidental Death & Dismemberment Insurance when you die. If you choose more than one primary beneficiary, payment shall be made in equal shares, or to the surviving primary beneficiaries in equal shares, or all to the last surviving primary beneficiary.

| Primary Beneficiary | Social Security # | Relationship |
|---|---|---|
| 1. Susan Tkachik | 373-54-1727 | Sister |
| 2. | | |
| 3. | | |

**Contingent Beneficiary**

Choose the person(s) whom you designate to receive your benefit if no primary beneficiary is alive at the time of your death. If you choose more than one contingent beneficiary, payment shall be made in equal shares, or to the surviving contingent beneficiaries in equal shares, or all to the last surviving contingent beneficiary.

| Contingent Beneficiary | Social Security # | Relationship |
|---|---|---|
| 1. Janet E. Mandeville, Trustee, or her successors in trust, under | | |
| 2. the Janet E. Mandeville Living Trust, dated June 27, 2002, | | |
| 3. and any amendments thereto. | | |

## 3. Signature

I understand that I am designating my beneficiaries for Basic Life Insurance, Supplemental Life Insurance (if chosen), and Accidental Death & Dismemberment Insurance. I revoke any previous designation made by me for such insurance benefits. I reserve the right to change this designation at any time by submitting a completed beneficiary designation form to Corporate Benefits. I understand that this beneficiary designation is not effective unless it is filed with ABN AMRO North America, Inc. prior to my death.

Employee Signature _____ Date June 27, 2002

Please send your completed form to Corporate Benefits via interoffice mail (code 01-206).

Corporate Benefits - White Employee - Yellow 6/96

H-1

ABN·AMRO North America, Inc.

# Group Profit Sharing and Savings Pl
# Beneficiary Designation Fo

## 1. Personal Information

Name Janet E. Mandeville Social Security number _____ Today's date 6-27-(

Street address 20985 24 Mile Road City Macomb State MI Zip code 48042

Date of birth _____ Date of hire _____ Sex ___ M X F Marital status ___S ___M _

## 2. Beneficiary Designation

### Primary Beneficiary

Indicate the person(s) whom you designate to receive the proceeds from your Group Profit Sharing and Savings Plan (the "plan") accounts in the event of yo death. If you choose more than one primary beneficiary, payment shall be made in equal shares, or to the surviving primary beneficiaries in equal shares, o to the last surviving primary beneficiary.

| Primary Beneficiary | Social Security Number | Relationship |
|---|---|---|
| 1. Susan Tkachik | | Sister |
| 2. | | |
| 3. | | |

### Contingent Beneficiary

Choose the person(s) whom you designate to receive your benefit from the plan if no primary beneficiary is alive at the time of your death. If you choose mo than one contingent beneficiary, payment shall be made in equal shares, or to the surviving contingent beneficiaries in equal shares, or all to the last surviv contingent beneficiary.

| Contingent Beneficiary | Social Security Number | Relationship |
|---|---|---|
| 1. Janet E. Mandeville, Trustee, or her successors in trust, under | | |
| 2. the Janet E. Mandeville Living Trust, dated June 27, 2002, | | |
| 3. and any amendments thereto. | | |

## 3. Signature

I understand that I am designating my beneficiaries for the Group Profit Sharing and Savings Plan. I revoke any previous designation made by me for such b efits. I reserve the right to change this designation at any time by submitting a completed beneficiary designation form to Corporate Benefits. I understand this beneficiary designation is not effective unless your completed form is filed with ABN AMRO North America, Inc. prior to my death.

The designated contingent beneficiary is to receive any proceeds payable from this plan if my primary beneficiary dies before me. If none of the designated beneficiaries are living at the time the death benefit is payable, the benefit will be paid as provided in the plan. If I am married, I understand that by law I a required to have my spouse's consent if I name a beneficiary other than my spouse. I understand that if I fail to get my spouse's signature, then my designa will not be effective. My consenting spouse's signature must be witnessed by a notary public.

I hereby certify that I release all my rights to a death benefit under this plan.

Spouse's Signature _____ Date _____

(Only required if your spouse is not the sole primary beneficiary.)

Notary Public

STATE OF Michigan COUNTY OF Oakland

I Thomas P. Cavanaugh a Notary Public (for said County and State), do hereby certify that Janet E. Mandeville personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and official seal this 27th da June +92002

Official Seal

Notary Public Signature _____ My commission expires 12/23/04

Employee must initial here _____

Employee Signature _____ Date _____

Please send your completed form to Corporate Benefits via interoffice mail (code 01-206).

Corporate Benefits - White Employee - Yellow 339 IC

H-2

Janet E. Mandeville
20985 24 Mile Road
Macomb, Michigan 48042

June 28, 2002

Dear Sir or Madam:

Attached please find the _____ and SpeedTrade Account Application form. It is my understanding that by executing these forms that I may open a new account and name a Transfer on Death beneficiary.

By executing the attached form, it is my intention to transfer all of the assets in all of my accounts held with Standard Federal from the existing accounts in my name alone to a new account in my name alone with my Sister, Susan Tkachik named as the Transfer on Death beneficiary.

I am married at this time, yet I do not wish for my husband to receive any benefit from any of the above listed accounts, with Standard Federal It is my desire that my sister, Susan tkachik, receive any and all benefits from the above listed accounts.

Very truly yours,

/s/Janet E. Mandeville
Janet E. Mandeville
373-54-1728

ABN·AMRO North America, Inc.

# Life Insurance Beneficiary Designation Form

Location _____ Employee # _____

## 1. Personal Information

| Name | Social Security number | Today's date |
|---|---|---|
| Janet E. Mandeville | 373-54-1728 | June 27, 2002 |

| Street address | City | State | Zip code |
|---|---|---|---|
| 20985 24 Mile Road | Macomb | Michigan | 48042 |

| Date of birth | Date of hire | Sex |
|---|---|---|
| 8/20/50 | 9/1/95 | __M X F |

H-1

## 2. Beneficiary Designation

### Primary Beneficiary

Indicate the person(s) whom you designate to receive the proceeds from your Basic (and Supplemental, if chosen) Life Insurance and Accidental Death & Dismemberment Insurance when you die. If you choose more than one primary beneficiary, payment shall be made in equal shares, or to the surviving primary beneficiaries in equal shares, or all to the last surviving primary beneficiary.

| Primary Beneficiary | Social Security # | Relationship |
|---|---|---|
| 1. Susan Tkachik | 373-54-1727 | Sister |
| 2. | | |
| 3. | | |

### Contingent Beneficiary

Choose the person(s) whom you designate to receive your benefit if no primary beneficiary is alive at the time of your death. If you choose more than one contingent beneficiary, payment shall be made in equal shares, or to the surviving contingent beneficiaries in equal shares, or all to the last surviving contingent beneficiary.

| Contingent Beneficiary | Social Security # | Relationship |
|---|---|---|
| 1. Janet E. Mandeville, Trustee, or her successors in trust, under | | |
| 2. the Janet E. Mandeville Living Trust, dated June 27, 2002, | | |
| 3. and any amendments thereto. | | |

## 3. Signature

I understand that I am designating my beneficiaries for Basic Life Insurance, Supplemental Life Insurance (if chosen), and Accidental Death & Dismemberment Insurance. I revoke any previous designation made by me for such insurance benefits. I reserve the right to change this designation at any time by submitting a completed beneficiary designation form to Corporate Benefits. I understand that this beneficiary designation is not effective unless it is filed with ABN AMRO North America, Inc. prior to my death.

Employee Signature _____ Date June 27, 2002

Please send your completed form to Corporate Benefits via interoffice mail (code 01-206).

Corporate Benefits - White Employee - Yellow 696

Best Available Copy

ABN·AMRO
North America, Inc.

# Group Profit Sharing and Savings Pl
# Beneficiary Designation Fo

## 1. Personal Information

Name Janet E. Mandeville Social Security number _____ Today's date 6-27-(
(First) (Middle) (Last)
Street address 20985 24 Mile Road City Macomb State MI Zip code 48042

Date of birth _____ Date of hire _____ Sex ___ M X F Marital status ___S ___M _

## 2. Beneficiary Designation

### Primary Beneficiary

Indicate the person(s) whom you designate to receive the proceeds from your Group Profit Sharing and Savings Plan (the "plan") accounts in the event of yo death. If you choose more than one primary beneficiary, payment shall be made in equal shares, or to the surviving primary beneficiaries in equal shares, or to the last surviving primary beneficiary.

| Primary Beneficiary | Social Security Number | Relationship |
|---|---|---|
| 1. Susan Tkachik | | Sister |
| 2. | | |
| 3. | | |

### Contingent Beneficiary

Choose the person(s) whom you designate to receive your benefit from the plan if no primary beneficiary is alive at the time of your death. If you choose mo than one contingent beneficiary, payment shall be made in equal shares, or to the surviving contingent beneficiaries in equal shares, or all to the last survivir contingent beneficiary.

| Contingent Beneficiary | Social Security Number | Relationship |
|---|---|---|
| 1. Janet E. Mandeville, Trustee, or her successors in trust, under | | |
| 2. the Janet E. Mandeville Living Trust, dated June 27, 2002, | | |
| 3. and any amendments thereto. | | |

## 3. Signature

I understand that I am designating my beneficiaries for the Group Profit Sharing and Savings Plan. I revoke any previous designation made by me for such b efits. I reserve the right to change this designation at any time by submitting a completed beneficiary designation form to Corporate Benefits. I understand this beneficiary designation is not effective unless your completed form is filed with ABN AMRO North America, Inc. prior to my death.

The designated contingent beneficiary is to receive any proceeds payable from this plan if my primary beneficiary dies before me. If none of the designated beneficiaries are living at the time the death benefit is payable, the benefit will be paid as provided in the plan. If I am married, I understand that by law I a required to have my spouse's consent if I name a beneficiary other than my spouse. I understand that if I fail to get my spouse's signature, then my designa will not be effective. My consenting spouse's signature must be witnessed by a notary public.

I hereby certify that I release all my rights to a death benefit under this plan.

Spouse's Signature _____ Date _____
(Only required if your spouse is not the sole primary beneficiary.)

Notary Public

STATE OF Michigan COUNTY OF Oakland

I, Thomas P. Cavanaugh, a Notary Public for said County and State, do hereby certify that Janet E. Mandeville personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and official seal this 27th da June 2002.

(Official Seal)

Notary Public Signature _____ My commission expires 12/23/04

Employee must initial here _____

Employee Signature _____ Date _____

Please send your completed form to Corporate Benefits via interoffice mail (code 01-206).

Corporate Benefits - White Employee - Yellow 329.IC

II-2

Janet E. Mandeville
20985 24 Mile Road
Macomb, Michigan 48042

June 28, 2002

Dear Sir or Madam:

Attached please find the _____ and SpeedTrade Account Application form. It is my understanding that by executing these forms that I may open a new account and name a Transfer on Death beneficiary.

By executing the attached form, it is my intention to transfer all of the assets in all of my accounts held with Standard Federal from the existing accounts in my name alone to a new account in my name alone with my Sister, Susan Tkachik named as the Transfer on Death beneficiary.

I am married at this time, yet I do not wish for my husband to receive any benefit from any of the above listed accounts, with Standard Federal It is my desire that my sister, Susan tkachik, receive any and all benefits from the above listed accounts.

Very truly yours,

/s/Janet E. Mandeville
Janet E. Mandeville
373-54-1728

LEXSEE 1991 US APP LEXIS 1839

AETNA LIFE INSURANCE COMPANY: SOUTH CENTRAL BELL TELEPHONE COMPANY: BELL SOUTH CORPORATION, Plaintiffs v. PAULINE CAROL WEATHERFORD, Defendant-Appellants, and REBECCA WEATHERFORD, Defendant-Appellee

No. 90-5585

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*1991 U.S. App. LEXIS 1839*

February 5, 1991, Filed

NOTICE: [*1]

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT, IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IN THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY:

*Report as Table Case at 924 F.2d 1057, 1991 U.S. App. LEXIS 6429*

PRIOR HISTORY: On Appeal from the United States District Court for the Middle District of Tennessee; No. 87-00900; Higgins Judge.

DISPOSITION:
REVERSED

JUDGES:
Keith Milburn, Circuit Judge; and Contie, Senior Circuit Judge

OPINION BY:
PER CURIAM.

OPINION:

Defendant-appellant Pauline Carol Weatherford appeals the district court's order granting summary judgment to defendant-appellee Rebecca Weatherford in this life insurance interpleader action. For the following reasons, we reverse the district court's summary judgment order entered for Rebecca Weatherford, and grant Pauline Weatherford's motion for summary judgment.

I.

On March 31, 1958, Earl Weatherford ("Weatherford"), a technician at the South Central Bell Telephone Company — a subsidiary of the

BellSouth Corporation ("BellSouth") enrolled in BellSouth's group life insurance policy (provided by the Aetna Life Insurance Company) and named his wife, Pauline [*2] Carol Weatherford ("Pauline"), beneficiary. Thereafter, on November 20, 1980, Weatherford enrolled in a supplemental Aetna policy (BellSouth paid the premiums on the basic policy; Weatherford paid the premiums on the supplemental policy) and again named Pauline as sole beneficiary. Less than four years later, however, Pauline and Earl Weatherford were divorced. The January 23, 1984 divorce decree did not mention the Aetna policies.

Earl Weatherford subsequently married Rebecca Weatherford ("Rebecca") on March 3, 1984. On July 5, 1984, Weatherford partially completed (by checking a box labeled "Change in Beneficiary Designation"), signed and dated a "South Central Bell Group Life Insurance Enrollment & Beneficiary Designation" form ("Form PR-6624"). Weatherford failed, however, to complete the PR-6624 Form — most notably: (1) Weatherford failed to designate any primary or contingent beneficiaries; (2) Weatherford failed to obtain a witness' signature as required; and (3) Weatherford failed to mail, or otherwise deliver, the PR-6624 Form to South Central Bell's Personnel

Office, or to Aetna's headquarters, as required under the Aetna policies as administered by South Central Bell. [*3] In fact, the uncompleted PR-6624 Form was found in Weatherford's briefcase, in a spare bedroom, following Weatherford's death in 1987.

Not surprisingly, neither South Central Bell nor Aetna had Weatherford's uncompleted July 5, 1984 PR-6624 Form in its files. In fact, the most recent beneficiary designation found in the companies' files following Weatherford's June 16, 1987 death was the November 20, 1980, PR-6624 Form designating Pauline Weatherford as the sole beneficiary under the Aetna policies.

Though not directly relevant to BellSouth's group life coverage, Rebecca Weatherford urges this court to find that Earl Weatherford's Form SN-1020 (applicable to BellSouth's employee benefit plans other than group life insurance; signed by Weatherford on April 7, 1987 — designating "my spouse as my only Primary Beneficiary") conclusively establishes Weatherford's intent to make Rebecca the beneficiary of his Aetna policies. It must be noted, however, that this form had not been submitted to BellSouth's Personnel Office; it was instead found in

Weatherford's desk following his death. Moreover, the uncompleted form "would have been returned because [Weatherford] did not check which [*4] plan he wanted to change to." Beverly Simpkins' June 27, 1988 Deposition at 24. Moreover, it is uncontroverted that South Central Bell's SN-1020 Form does not directly affect an employee's group life insurance coverage.

In April 1987, South Central Bell informed its employees that their supplemental group life insurance coverage (i.e., the supplemental portion of their Aetna coverage) was being replaced by FlexLife (provided by Travelers Life Insurance Company) effective July 1, 1987. FlexLife offered eligible employees the option to purchase expanded life insurance coverage (up to four-times an employee's annual pay) at the employee's expense. The basic group life insurance, however, remained with Aetna.

To obtain FlexLife coverage, employees had to apply during the March 2, 1987 — June 12, 1987 enrollment period. On April 17, 1987, Weatherford executed (but did not mail) FlexLife's "Application or Waiver of Insurance" to obtain supplemental

coverage equal to twice his salary. Weatherford named his wife, Rebecca, as sole beneficiary.

Weatherford suffered a stroke on June 8, 1987, and was hospitalized (in a coma) until his death on June 16, 1987. On June 15, 1987 (three [*5] days after the enrollment period had expired), Travelers received Weatherford's FlexLife application designating Rebecca as beneficiary; it is unknown who mailed the FlexLife application (dated April 17, 1987) in light of Weatherford's incapacitating stroke. Nevertheless, because BellSouth's FlexLife policies did not become effective until July 1, 1987, the parties stipulated that "at the time of Earl W. Weatherford's death, the FlexLife insurance was not in effect." Stipulation of Facts at 6.

Immediately following Earl Weatherford's death, a three-page handwritten document (solely in Weatherford's handwriting, but not signed) dated November 17, 1986, was found in Weatherford's bedroom dresser drawer. This purported holographic will provided, inter alia:

Everything else goes to Rebecca to do with as she wishes. She should give something personal to my Sisters and Brothers that they want and she doesn't.

I also want everybody to give Rebecca the respect she deserves for putting up with me all these years and bringing love and happiness back into my life that was missing for so long. She made me feel young and alive that I thought was gone for me. If you love me don't give [*6] her any more problems because she has had enough.

Carol has received all she should ever receive.

Joint Appendix at 98-100.

On August 26, 1988, fourteen months after Earl Weatherford's death, Rebecca Weatherford's attorney mailed: (1) Weatherford's signed, but uncompleted, SN-1020 Form (used by South Central Bell for benefits other than group life insurance); and (2) the Travelers Life Insurance application (for FlexLife coverage) to Aetna in an attempt to comply with the beneficiary terms of the Aetna group life insurance policies.

Aetna Life Insurance Company filed this interpleader action in district court (basing jurisdiction on diversity of citizenship) following Earl Weatherford's death. Aetna: (1) disclaimed any interest in the $66,000 it owed under Weatherford's basic and supplemental life insurance policies; (2) joined Rebecca and Pauline Weatherford as defendants (pursuant to *Fed. R. Civ. P. 22(1)*); (3) deposited the money with the court; and (4) sought discharge from all further liability. Pursuant to an Agreed Order dated July 22, 1988, Aetna deposited $68,426.62 with the court (representing death benefits plus accrued interest). The district court subsequently [*7] dismissed Aetna, South Central Bell and BellSouth from this action, with prejudice.

Pauline and Rebecca thereafter filed motions for summary judgment. On October 26, 1988, the summary judgment motions were referred to a magistrate pursuant to *28 U.S.C. § 636*(b)(1)(B). After analyzing the relevant facts, and the applicable law, the magistrate recommended that the district court grant Pauline Weatherford's summary judgment motion. Maintaining that Earl Weatherford had substantially complied with Aetna's change of beneficiary provisions (thereby evidencing his intent

to make her the policies' beneficiary), Rebecca submitted timely objections to the magistrate's report and recommendation. Pauline, however, insisted that Weatherford's 1980 beneficiary designation govern this action.

The district court subsequently rejected the magistrate's report and recommendation and granted Rebecca Weatherford's summary judgment motion thereby declaring Rebecca the beneficiary of Earl Weatherford's life insurance:

Indeed, Earl Weatherford's manner of changing his beneficiary designation was unorthodox, but Aetna's policy is broad enough to accommodate such unique compliance. Although Earl Weatherford [*8] was apparently confused as to which form to complete, his efforts constituted written requests effective April 7 and 17, 1987, which were filed with Aetna at its home office in Hartford, Connecticut. Therefore, the Court finds that Earl Weatherford took affirmative steps during his life to change the beneficiary of his life insurance from his former wife to his current wife and that this sufficiently meets the substantial compliance test.

District Court's March 30, 1990 Memorandum at 8.

Pauline Weatherford thereafter filed a timely notice of appeal.

II.

A.

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56.* A district court's grant of summary judgment is reviewed *de novo. Pinney Dock & Transp. Co. v. Pennsylvania Cent. Corp., 838 F.2d 1445, 1472* (6th Cir.), cert. denied, *488 U.S. 880 (1988).* In its review, this court must view all facts and inferences drawn therefrom in the light most favorable to the nonmoving party. 60 *Ivy St. Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987).*

Though the moving party has the burden of conclusively [*9] showing that no genuine issue of material fact exists, id., the nonmoving party cannot rest on its pleadings in the face of a summary judgment motion, but must come forward with some probative evidence to support its claim. *Celotex Corp.*

*v. Catrett, 477 U.S. 317, 324 (1986)*; 60 Ivy St. Corp., 822 F.2d at 1435.

"By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)* (emphasis in original). The dispute must be genuine and the facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. 60 Ivy St. Corp., 822 F.2d at 1435. If the disputed evidence "is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson, 477 U.S. at 249-50* (citations omitted).

B.

Though the magistrate conducted a comprehensive analysis to determine whether federal common law (pursuant to ERISA pre-emption), Tennessee [*10] law, or Georgia law governs this action, the district court correctly concluded that "Rebecca Weatherford's objection on the issue of whether the Magistrate correctly applied federal common law or state insurance law is moot," District

Court's March 30, 1990 Memorandum at 3, because Tennessee, Georgia, and federal common law all employ the "substantial compliance" test. *Bohannon v. Manhattan Life Ins. Co., 555 F.2d 1205, 1210 (5th Cir. 1977)* (construing Georgia law) ("A change-of-beneficiary is effective when it is clear that the insured intends a change, has a right to make a change, and takes reasonable steps to bring about a change. Generally, substantial compliance with these conditions is sufficient."); *Magruder v. Northwestern Mut. Life Ins. Co., 512 F.2d 507, 509 (6th Cir. 1975)* (construing Tennessee law) (A "change of beneficiary form [must be] submitted in actual or substantial compliance with the terms of the insurance policy."); *Republic Nat'l Life Ins. Co. v. Sackmann, 324 F.2d 756, 758 (6th Cir. 1963)* (construing Tennessee law) (the beneficiary in an insurance policy may be changed if the insured substantially complies with the provisions of the policy — [*11] substantial compliance requires that the insured do everything he can to make the change); *Jaudon v. Prudential Ins. Co. of America, 279 F.2d 730, 733 (6th Cir. 1960)* (same); *Faircloth v. Coleman, 86 S.E.2d 107, 110 (Ga. 1955)* (same); *Stoker v. Compton, 643 S.W.2d 895, 897-98 (Tenn. Ct. App. 1981)* (same).

Accordingly, we must now determine whether Earl Weatherford substantially complied with the beneficiary change provisions of his Aetna policies (basic and supplemental coverage).

C.

In his report and recommendation, the magistrate noted that:

Rebecca Weatherford, the widow, cites four acts by [Earl] Weatherford to establish his substantial compliance with the policy's provisions on changes of beneficiaries and to effect a change in the designation of his beneficiary: (1) the incompleted Form PR-6624; (2) the April 7, 1987 SN-1020; (3) the June 15, 1987 FlexLife application; and (4) the April 17, 1987 forms designating Rebecca Weatherford as his beneficiary. In evaluating these facts, Rebecca Weatherford also cites the divorce decree, with its property settlement agreement between Weatherford and Pauline Weatherford as well as Weatherford's purported will and his conversations [*12] regarding his intentions to have his insurance policy proceeds distributed to Rebecca Weatherford and his children. Moreover, Rebecca Weatherford also argues that there was confusion among South Central Bell employees regarding enrollment in the FlexLife Plan.

Magistrate's September 12, 1989 Report and Recommendation at 29.

With respect to Form PR-6624, it is undisputed that Weatherford failed to: (1) elect enrollment; (2) designate a beneficiary; (3) designate the number and type of beneficiaries; (4) obtain a witness' signature; and (5) mail, or otherwise deliver, the form to South Central Bell or Aetna. Speculation as to why this form was not completed and mailed would be futile. Accordingly, we must conclude that Weatherford's uncompleted PR-6624 Form (found after his death in his briefcase) does not alter Pauline Weatherford's right to the insurance proceeds.

As the magistrate correctly noted, the partially completed Form SN-1020 (found in Weatherford's desk following his death) is similarly irrelevant to this action:

[Though,] to a degree, this form indicates Weatherford's intention to change his beneficiary at least on some of his employee benefit plans, [because] this [*13] latter form does not include basic life insurance coverage, it is difficult to accept this form as reflecting Weatherford's intent to change the

beneficiary on his basic group life insurance. Although Rebecca Weatherford presented evidence that this Form SN-1020 was completed properly because Weatherford was confused as to the proper form to use, the form itself is clear as to the benefit plans that it affects.... Thus, this form does not represent all that Earl Weatherford could do to effect a change in his named beneficiary on this life insurance policy.

Magistrate's September 12, 1989 Report and Recommendation at 31. Accordingly, the decedent's uncompleted and undelivered SN-1020 Form fails to prove Weatherford's resolve to change beneficiaries on his Aetna life insurance policies.

Weatherford's April 17, 1987 FlexLife application (received by Travelers' administrator on June 15, 1987-three days after the enrollment period had expired) similarly fails to alter Pauline Weatherford's rights under the Aetna policies. Though Rebecca Weatherford argues that the FlexLife application unquestionably demonstrates Earl Weatherford's desire to make her the beneficiary of his life [*14] insurance proceeds, it is clear that the decedent did not do "all that he could to comply with

the provisions of the policy." *Magruder, 512 F.2d at 509 (quoting Cronbach v. Aetna Life Ins. Co., 153 Tenn. 362, 367 (1926))*. Simply stated, Earl Weatherford's actions did not demonstrate a clear intent to change the Aetna policies' beneficiaries.

The appellee alternatively asserts that her attorney's act of mailing the Travelers' FlexLife application to Aetna fourteen months following her husband's death satisfies Aetna's beneficiary provision:

An employee, whether or not employment has terminated, may designate a beneficiary, and at any time change his designation, by written request field [sic] at the headquarters of the Policyholder or at Aetna's Home Office in Hartford, Connecticut. The designation or change will take effect as of the date the employee executes the request, whether or not he is living at the time of filing....

Aetna's Group Life Insurance Policy with BellSouth at 7050. Though the district court accepted Weatherford's FlexLife application as notice to Aetna that he wished to change beneficiaries on his Aetna policies, such a finding is erroneous and requires

[*15] an unwarranted inferential leap. The fact remains that Weatherford had the Aetna form (Form PR-6624) necessary to effect the beneficiary change that Rebecca claims he intended. It can hardly be said that Earl Weatherford did "all that he could to comply with the provisions of the policy,"*Magruder, 512 F.2d at 509*, when the uncompleted form (dated three years earlier) was found in his briefcase following his death. Accordingly, the decedent's FlexLife application does not affect Earl Weatherford's beneficiary designation under his Aetna policies.

Moreover, Earl and Pauline Weatherford's divorce decree and property settlement, Earl Weatherford's alleged verbal statements regarding the beneficiary of his life insurance, and the decedent's purported holographic will all fail to support Rebecca's claim that Earl Weatherford substantially complied with Aetna's change of beneficiary requirements.

In an analogous case, after noting that the plaintiff's "claim to the insurance proceeds must be founded either on actual or substantial compliance with the policy provisions governing the change of

beneficiaries," *Magruder, 512 F.2d at 508*, this court held:

The failure of the insured [*16] to send the form to the company has no reasonable explanation which would invoke the equitable powers of the court. There is no question that he had ample opportunity to return the forms, or that he had the requisite physical and mental capacity to do so. He did not set the procedures in motion by placing the form changing the beneficiary in the hands of a representative of the insurance company....

Since the change of beneficiary form was not submitted in actual or substantial compliance with the terms of the insurance policy, [the district court judge] was correct in holding that the change is ineffective....

*Id. at 509-10.*

Because "a mere unexecuted intention on the part of an insured to change his beneficiary is not enough," *Jaudon, 279 F.2d at 733*, we find Pauline Weatherford to be the proper beneficiary of Earl Weatherford's life insurance proceeds. See id.("There

must be substantial compliance with the provisions of the policy for the change of beneficiary to be effective.").

III.

For the aforementioned reasons, we REVERSE the district court's summary judgment order entered for Rebecca Weatherford, and grant Pauline Weatherford's [*17] motion for summary judgment.

LEXSEE 2002 US DIST LEXIS 16427

LINA MOUKALLED, Plaintiff - vs - MINNESOTA MUTUAL LIFE INS. CO., Defendant.

CASE NO.: 01-72051

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2002 U.S. Dist. LEXIS 16427

August 19, 2002 Decided
August 19, 2002, Filed

SUBSEQUENT HISTORY: Affirmed by *Moukalled v. Minn. Life Ins. Co. 2004 U.S. App. LEXIS 2391* (6th Cir. Mich., Feb. 10, 2004)

DISPOSITION: [*1] Defendant's motion for summary judgment granted and plaintiff's motion for summary judgment denied. MCPA claim dismissed.

COUNSEL: For Lina Moukalled, PLAINTIFF: Barry A. Siman, Barry A. Seifman Assoc, Farmington Hills, MI USA.

For Minnesota Life Insurance Company, DEFENDANT: Joseph G. Lyons, Cozen O'Connor, Chicago, IL USA.

JUDGES: PAUL D. BORMAN, UNTIED STATES DISTRICT JUDGE.

OPINION BY: PAUL D. BORMAN

OPINION:

OPINION AND ORDER (1) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND (2) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant's motion for summary judgment (Docket Entry # 10) and Plaintiff's motion for summary judgment (Docket Entry # 12). The Court heard oral argument on these motions on July 17, 2002. Upon consideration of the motions, the submissions of the parties, and the applicable law, the Court will GRANT Defendant's motion, and DENY Plaintiff's motion.

I. BACKGROUND

Great Lakes Color Printing, Inc. (hereinafter "Great Lakes") purchased a life insurance policy insuring the life of Jihad Moukalled (hereinafter "Decedent") from Defendant, Minnesota Mutual Life Insurance Company, in April of [*2] 1997, for

$450,000 (Policy No. 2-101-045, "the policy"). Decedent was the President of Great Lakes. The policy, as issued, listed Great Lakes as the beneficiary. (Policy, Exh. 1 to Def.'s MSJ, at Appl. page 2.)

As to changing the beneficiary, the policy provides:

> Can you change the beneficiary?
> Yes. If you have reserved the right to change the beneficiary, you can file a written request with us to change the beneficiary....
> Your written request will not be effective until it is recorded in our home office records. After it has been so recorded, it will take effect as of the date you signed the request. However, if the insured dies before the request has been so recorded, the request will not be effective as to those death proceeds we have paid before your request was recorded in our home office records.

(Policy, at 5.) The policy defines "written request" as "[a] request in writing signed by you. We also may require that your policy be sent in with your written request." (*Id.* at 3.) The policy does not specify that any particular form must be used to change one's beneficiary designation. Prior to November of 2000, Decedent did not file any written requests [*3] to change the beneficiary of the policy.

In the early morning hours of November 21, 2000, Decedent visited his sister, Lina Moukalled (Plaintiff) and her husband Mohamed Khadr, at their home. While there, he allegedly begged their forgiveness for running up a sizable debt in their names (by falsifying credit applications in their names, forging their signatures to the applications, receiving credit cards in their names, and then forging their signatures to credit card purchases and making cash advances).FN1 Decedent presented them with a sealed manila envelope, and told them to take the envelope to Decedent's personal attorney, Marc Fishman. Decedent left their home, and called them on his cellular telephone, again to beg forgiveness.

FN1. At oral argument, counsel for Plaintiff conceded that Decedent's sister and her husband would not be liable for any credit card debts created by Decedent's falsifying credit card applications in their names, or using credit cards based upon forged signatures.

Later that morning, Decedent killed his wife and children, and then shot himself.FN2

FN2. The policy's suicide provision provides that death by suicide is excluded if it occurs within the first two years of the policy. Decedent's policy was taken out in April of 1997; his suicide was in November of 2000-about three and a half years later. Thus, his suicide does not preclude payment of the policy proceeds.

A few days after Decedent's death, Plaintiff and her husband met with Mr. Fishman at his office. At that meeting, the manila envelope was opened, and its contents were reviewed. Among other insurance policies,FN3 the policy at issue in this case was found inside the envelope. Plaintiff and her

husband both testified at their depositions that on Decedent's policy with Defendant (i.e., the policy at issue in this case), there was a "post-it" note attached inside the cover of the policy itself, on the first page containing policy information (such as the policy number, etc.). (Dep. of Lina Moukalled, Exh. A to Pl.'s Reply, page 66-67; [*5] Dep. of Mohamed Khadr, Exh. B to Pl.'s Reply, at 29-30.) Mr. Fishman, at his deposition, testified that he could not recall the contents of any of the notes, but there were some "sticky notes on some of the policies."(Dep. of Marc Fishman, Exh. C to Pl.'s Reply, at 29-30.) The "post-it" has handwriting and a signature on it, and reads: "Requested change of ownership to Jihad Moukalled, has been paying premium with personal checks. Requested change of beneficiary to wife and contingent beneficiary to sister Lina Moukalled. [/s/] Jihad Moukalled" (Policy, Exh. 1 to Def.'s MSJ, at 1.) Also enclosed in the envelope was a personal check from Decedent to Defendant for a premium payment; Defendant's address, and the policy number, were written on the check. (Exh. F to Pl.'s Resp./Cross-MSJ.) The check was dated October 18, 2000. (*Id.*)

FN 3. Apparently there was also a spreadsheet, created by Decedent, that listed the fraudulent credit card accounts with the amounts owed on the cards of Plaintiff, her husband, and their father. There were also other records/documents in the envelope, including a letter addressed to Mr. Fishman, regarding the credit card debts.

[*6]

In January of 2001, Plaintiff, through her counsel in the instant case, sent a copy of the "post-it" note attached to the first page of the policy, with a letter to Defendant, asking it to honor the purported change of beneficiary, i.e., substitute Lina Moukalled as the beneficiary. (Exh. 4 to Def.'s MSJ.) In February of 2001, Defendant sent Plaintiff's counsel a letter indicating that Defendant would not honor the handwritten note "at this time because it does not indicate a policy number, date of the request, and to whom the request was made."(Exh. 5 to Def.'s MSJ.) About a week later, Plaintiff's counsel sent Defendant a letter indicating that the note was attached to the policy itself, and offering to submit affidavits regarding Decedent's intent to change his beneficiary with Defendant. (Exh. 4 to Def.'s MSJ, at 3.)

Defendant sent a response letter in March of 2001, reiterating Defendant's refusal to honor the handwritten note. (Exh. 5 to Def.'s MSJ, at 2.)

On April 18, 2001, Defendant paid the life insurance proceeds plus interest ($457,780.56) to Old Kent Bank, as secured creditor of Great Lakes. (Exh. 6 to Def.'s MSJ.)

This action ensued. On April 20, 2001, Plaintiff filed [*7] her original complaint in Oakland County Circuit Court. Defendant timely removed the action to this Court on the basis of diversity jurisdiction. The complaint alleges two causes of action: Count I-Breach of Contract-Third Party Beneficiary; and Count II-Michigan Consumer Protection Act. Defendant filed its motion for summary judgment on March 19, 2002; Plaintiff filed her cross-motion for summary judgment on April 8, 2002. These two motions are currently before the Court.

II. ANALYSIS

A. Summary Judgment Standard

This Court grants summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* Summary judgment is proper when "a party ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).* If the moving party satisfies [*8] its burden, the party opposing the motion "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).* However, "the mere existence of a scintilla of evidence" in support of the non-moving party is not sufficient to show a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).*

The filing of cross motions in a jury case (such as the case at bar) does not require the Court to resolve the case at the summary judgment stage. As

explained in *B.F. Goodrich Co. v. U.S. Filter Corp., 245 F.3d 587 (6th Cir.2001)*:

> It was not necessary for the district court to resolve the case at summary judgment solely because the parties filed cross-motions for summary judgment and presented a Joint Statement of Undisputed Material Facts. When parties file cross-motions for summary judgment, "the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that [*9] the losing party waives judicial consideration and determination whether genuine issues of material fact exist."10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2720 (3d ed.1998). A trial court may conclude, when reviewing the undisputed material facts agreed upon by the parties and drawing all inferences, in turn, for the non-moving party, that a genuine issue exists as to

those material facts, in which case the court is not permitted to resolve the matter, but rather, must allow the case to proceed to trial. *See ITCO Corp. v. Michelin Tire Corp., Commercial Div., 722 F.2d 42, 45 n. 3 (4th Cir.1983).* The district court in this case could have ruled, as it did, that one party sufficiently demonstrated that no genuine issue of material fact existed. The court also could have ruled, however, that neither party met its burden of demonstrating that no genuine issue of material fact existed when all inferences were drawn, in turn, for the non-moving party, such that it would be proper for the case to go to trial. Therefore, summary judgment was not necessarily appropriate solely because the parties filed cross-motions for summary [*10] judgment.

*Goodrich, 245 F.3d at 593* (footnotes omitted).

B. Breach of Contract Claim

When determining whether a party is entitled to benefits under an insurance policy, Michigan courts look to the language of the policy, and interpret the terms of the policy according to "well-established principles of contract construction." *Singer v.. American State Ins., 245 Mich.App. 370, 374, 631 N.W.2d 34 (Mich.Ct.App.2001).* Any ambiguity in the terms of an insurance policy is construed against the insurer, as drafter of the contract, and in favor of the insured. *Id.; see also Bianchi v. Automobile Club of Mich., 437 Mich. 65, 70, 467 N.W.2d 17 (Mich.1991).*

As to a common law breach of contract claim, Michigan courts apply the "substantial compliance" test. An early interpretation of the substantial compliance test was announced by the Michigan Supreme Court in 1914:

> Where the [insured] has done all that he is required to do, and only formal ministerial acts on the part of the [insurer] remain to be done in order to complete the change, and the [insured] dies before performance thereof, a court

> of equity will protect the rights [*11] of the intended beneficiary.

*See Supreme Court I.O.F. v. Frise, 183 Mich. 186, 192, 150 N.W. 110 (Mich.1914).* The Michigan Supreme Court later made clear, though, that an unexecuted intent to change beneficiaries is insufficient to effect the change. *Reed v. Metropolitan Life Ins. Co., 269 Mich. 26, 31, 256 N.W. 610 (Mich.1934); see also Cooper v. United States, 340 F.2d 845, 848 (6th Cir.1965)* ("[The] substantial compliance doctrine ... is not applicable [in] the present case [because of the] insured's complete failure to execute any written statement attempting to transfer [the policy proceeds].") A later statement by the Michigan Supreme Court of the substantial compliance test appeared in *Dogariu v. Dogariu, 306 Mich. 392, 398, 11 N.W.2d 1 (Mich.1943):*

> Where the contract of insurance outlines the manner of method by which beneficiaries may be designated or changed, the steps or formalities so stipulated must be at least substantially complied with, it being quite generally conceded that in such a

> case a designation can be made effective only by following the policy provisions and by [*12] conforming to the manner or mode specified in the contract.... The provisions of a life policy as to the manner of changing the beneficiary must be complied with, at least, substantially so ....

*Id. at 398* (internal citations omitted). In *Dogariu, supra*, the insured, shortly before his death, caused a will to be drawn up, attempting to direct the disposition of his life insurance proceeds. The court held that the will did not constitute compliance with the provisions of the policy requiring filing a written change with the company, accompanied by the policy at issue for its endorsement. Thus, the change was ineffective, not because the court could not reasonably discover his intent, but rather, because his actions were insufficient to effect the change.

The cases following the enunciation of the substantial compliance test turn on one of two issues: (1) determining the intent of the deceased, and (2) determining whether the intent was carried forth with sufficient action in terms of complying with the

requirement(s) of the insurance policy, in order to effect the change. *See Harris v. Metropolitan Life Ins. Co., 330 Mich. 24, 46 N.W.2d 448 (Mich.1951)* [*13] (insured executed a change of beneficiary, gave it to an attorney who delivered it to the insurer, but without sending the "certificate" as required by the policy's requirements; court held that insured "did all in his power to effect the change in the manner prescribed in the policy," and there was "substantial compliance" to change of beneficiary); *Aetna Life Ins. Co. v. Owens, 318 Mich. 129, 27 N.W.2d 607 (Mich.1947)* (insured signed change of beneficiary card, had it witnessed, and had it sent to the insurance company, which recorded it prior to his death; court concluded that the change of beneficiary was effectuated in accordance with policy requirements); *Aetna Life Ins. Co. v. Mallory, 291 Mich. 701, 289 N.W. 302 (Mich.1939)* (holding that because there was no clear intention on the part of the deceased to deliver the will or to have it delivered to the insurance company before he died, he had not sufficiently complied with the terms of the policy, and the purported change of beneficiary was not effective).

In *Aetna Life Ins. Co. v. Parker, 130 F.Supp. 97 (E.D. Mich. 1955)*, on the original beneficiary form where the typewritten [*14] name of the insured's wife appeared as beneficiary, the insured, in a green color pencil, printed the name of his sister, and signed the change, without obliterating the name of his wife, and without filing it with his insurance company. The court noted that "his wife [who was contesting the change] was aware that he had executed the purported change of beneficiary; that he had executed the purposed change before he left home, and hence, about a year before his death." *Id. at 98.*

The court undertook to analyze the policy's requirements (written request, filed with the insurer, but need not be filed before the death, so long as filed before the proceeds paid out) and then held that the change of beneficiary (or rather, the addition of a second beneficiary to share with the first) was effectuated. The court specifically found:

> No special form of request for change of beneficiary is required to be used. Endorsement of the change on the policy by the insurer was not a prerequisite to

effectuate a change. Neither was receipt of the request by the insurer prior to the death of the insured a requirement of the policy. Acknowledgment of the insured's signature on the [*15] request was not a condition. The only requirement of the policy in the instant case was that the change could be accomplished by 'written request' filed any time. What constitutes such 'written request' is not spelled out, but rather the term is shrouded with ambiguity by reason of the lack of other formal requirements as were present in the cases above cited. However, the Court is of the opinion that the term 'written request' as set forth in the policy means a manifestation in writing of the intention of the insured directed to the attention of the insurer. Since such request need not be filed before the death of the insured, it would seem that any writing by the insured which clearly manifests his intention to change the beneficiary would suffice, so long as there is compliance with the further requirement of filing the same. What amounts to a filing is, likewise, not clear. It does seem clear, however, that the purpose of such requirement was to bring to the attention of the insurer the intention of the insured with respect to a change of beneficiary either prior or subsequent to the insured's death in order that the proceeds be paid

to the proper beneficiary. If this be so, then [*16] it seems to the Court that there has been a sufficient compliance with the terms of the policy. The writing on the face of the certificate is an expression of the desire of the insured directed to the attention of the insurer respecting the manner in which the proceeds of the policy should be paid to the beneficiaries named therein by the insured. As so placed, it was well calculated to come to the attention of the insurer, and, hence, to amount to a filing of the request. That it would not come to the insurer's attention until after the insured's death was expressly immaterial. That the manner adopted by the insured was somewhat unorthodox cannot be doubted, but nothing in the policy provisions precludes such unorthodox compliance therewith.

*Id. at 100* (internal citations omitted). The court emphasized that there was "trustworthy evidence of the insured's desire as manifested on the face of the certificate." *Id. at 101.*The court further noted that "no possibility of fraud or forgery is present here in view of the wife's own testimony wherein she acknowledged the signature involved to be that of her husband, and said she was aware that he [*17] had so signed the instrument." *Id.* These last-noted

assurances are not present in the instant case. The court in Parker found he had substantially, although not literally, complied with the policy's requirements.

In the Sixth Circuit decision, *Aetna Life Ins. Co. v. Weatherford, No. 90-5585, 1991 WL 11611* (6th Cir., Feb. 5, 1991) (unpublished), the insured participated in a group insurance plan through his employer, and had listed his first wife as the beneficiary. They divorced, and the insured remarried. He partially completed a change of beneficiary form for his life insurance policy by checking a box labeled "change in beneficiary designation," signing and dating it, but he failed to list any beneficiary whatsoever, did not have it witnessed as required by the policy, and did not mail or otherwise deliver the form to the insurance company (it was found in his briefcase, in a spare bedroom, after his death, but it was dated three years prior to this death). On a separate form (for other employee benefit plans, but completely inapplicable to the group life insurance) the insured had designated his wife as the "only" primary beneficiary. *Aetna, 1991 1991 U.S. App. LEXIS, 1991* WL 11611 [*18] at *1. However, that form was also uncompleted, and was found in his desk after his

death. On a form to apply for supplemental group life insurance (through a different insurer than the original group life insurer), the insured had listed his new wife as his sole beneficiary; however, that form was not mailed until after the application period had expired, which was also after the insured's death.

In analyzing the conflicting claims for benefits (between the ex-wife and the new wife), the Sixth Circuit acknowledged without analysis that ERISA applied, and then stated that "the district court correctly concluded that ... Tennessee, Georgia, and federal common law all employ the 'substantial compliance' test." Aetna, 1991 U.S. App. LEXIS 1839 [WL] at *4. The court analyzed each of the three separate forms listed above, and in turn, found that each form's incompleteness and/or failure to reach the insurer was fatal to the new wife's claim for benefits. The court held that the insured had not done all he could do to effectuate the change of beneficiary for his original life insurance policy, and thus, he had not substantially complied with the policy requirements. The court awarded the life insurance proceeds to [*19] the first wife. *Aetna, 1991 U.S. App. LEXIS 1839.* [WL] at *6.

In *Life Ins. Co. of N. Amer. v. Leeson, F.Supp.2d, 2002 WL 483563* (S.D.Ohio, Mar.19, 2002), the insured participated in a group life insurance plan through his employer, and had originally listed his sister as beneficiary. Thereafter, he married, and allegedly expressed his intent to change the beneficiary to replace his sister's name with his wife's. Some weeks before his death, the insured filled out a change of beneficiary form, and left it with his wife to mail (with other items). She neglected to do so, and when he inquired about it and found out nothing had been mailed, he put the items (including the beneficiary form) in his lunchbox to take to work and mail. Less than two weeks later, the insured died in a car accident. The papers were found in his lunchbox following his death, and were subsequently mailed to the insurer.

The court recognized the applicability of ERISA, and applied, citing *Aetna. 1991 U.S. App. LEXIS 1839* the substantial compliance test under "the federal common law." The policy had required only that written notice be given to the employer or the insured, effective as of the date [*20] of the request, even if received after the insured's death, so long as the insurer received notice prior to paying out

the proceeds. The only factual issue in the case was whether the insured's failure to mail the form vitiated the widow's argument that the insured had "substantially complied" with the policy requirements. The court held that it did. The court found that the insured's failure to mail the form was not a "sufficient positive action in furtherance of [his] intent" to change beneficiaries, and awarded the policy proceeds to the insured's sister. *Aetna, 1991 U.S. App. LEXIS 1839*, [WL]. at *7-8.

In the instant case, the insurance policy requires a request in writing to be recorded in the home office prior to the proceeds being paid out. Here the Defendant received Plaintiff's papers prior to paying out the proceeds to Great Lakes' creditor.FN4

> FN4. The Court rejects Defendant's argument that the fact that it has already paid out the proceeds is fatal to Plaintiff's claim. Because there is the availability of an interpleader action if the insurer has any question as to the propriety of the change of beneficiary, Defendant is not shielded from liability if it paid out the proceeds

in the face of what might have been a change of beneficiary written request.

[*21]

The Court finds the following undisputed facts to be dispositive. The instant case resolves around a single "post-it" note located on the first page of the instant insurance policy, that states, "requested," as to significant changes in the policy by the Defendant insurance company, to wit (1) a change in ownership, and (2) a change in beneficiary.

First, there is the request that the Defendant change the ownership of the policy from Great Lakes to Decedent. Significantly, Decedent was not the sole shareholder of the company — Great Lakes had two other shareholders — Mr. Gordon and Mr. Gaskill. (Dep. of Mohamed Khadr, Exh. B to Pl.'s Reply, at 32.) The policy contains Decedent's signature as President of Great Lakes. Nothing on the "post-it" indicates that he is writing as president of the company, or that he has been authorized by the company to make this significant change of beneficiary that would potentially diminish company assets.

Second, there is the request for a change in the beneficiary from Great Lakes, the owner and beneficiary of the policy, to the Decedent's wife, and thereafter the Plaintiff, Decedent's sister.

Both of these significant changes in the policy are [*22] now sought to be legitimized by Plaintiff based on a "post-it" note on the policy, which was not addressed to, or directed toward anyone, much less to the Defendant insurance company.FN5

> FN5. Further muddying Plaintiff's claim is the wording of the "post-it," which is not addressed to anyone, and does not even direct the reader to make the change(s). The writing on the "post-it" reads, in its entirety:
>
> > Requested change of ownership to Jihad Moukalled. has been paying premium with personal checks. Requested change of beneficiary to wife and

> contingent beneficiary to sister Lina Moukalled. [/s/] Jihad Moukalled.

(Policy, Exh. 1 to Def.'s MSJ, at 1.) The wording of the "post-it" note, using the term "requested," does not denote a present request to make the changes: "Requested change of ownership .... Requested change of beneficiary." (*Id.*, emphasis added.) "Requested," in its ordinary and plain meaning, is the past-tense form of the word "request." Thus, the "post-it" can be read as merely documenting that a prior request to make the changes had been made. However, nothing in the record evidences such an earlier request to the Defendant. Thus, the "post-it" does not indicate a present "request" to change the ownership or the beneficiary. The Court notes that Decedent was highly proficient in the English language, as evidenced by the full page letter he wrote to his attorney. (*See* Letter, Exh. E to Pl.'s Resp.)

[*23]

Decedent was not the owner of the policy, and by the terms of the policy, only the owner could change the beneficiary. The policy states "If you have reserved the right to change the beneficiary, you can file a written request with us to change the beneficiary."(Policy, Exh. 1 to Def.'s MSJ, at 5, emphasis added.) The policy defines "you" as "[t]he owner of the policy, as shown in the application ...." (*Id.* at 3.) The owner, as shown on the application attached to the policy, is Great Lakes Color Printing, Inc. (*Id.* at 10.)In order to have the power to change the beneficiary, Decedent would have had to have been acting in his capacity as president of Great Lakes Color Printing, Inc., the owner of the policy. However, the "post-it" note does not in any way refer to Great Lakes Color Printing, Inc., or to Decedent as acting on behalf of the corporation. Indeed, it is signed by Jihad Moukalled as an individual, without any reference to the corporation. Thus, what was "requested" to an anonymous person or entity could not have been effectuated by Decedent as written, because the change of ownership was not effectuated, and the change of beneficiary was not effectuated.
[*24]

The alleged request was not directed to Defendant, and there is no evidence that Decedent ever requested that it be directed to Defendant. There is no trustworthy evidence that Decedent intended that the alleged "request" be delivered to Defendant, nor is there any evidence that Decedent took the necessary steps to arrange for the "request" to be delivered to Defendant. Specifically, Plaintiff was directed to deliver the policy to Mr. Fishman. However, Mr. Fishman, to whom Decedent allegedly directed the envelope to be delivered, was not instructed to deliver the policy to the insurer. The policy requires that the written request be "file[d] ... with us to change the beneficiary. Your written request will not be effective until it is recorded in our home office records."(Policy, at 5.) The Court cannot find that Decedent literally or substantially complied with the requirement that the request be filed with Defendant, and recorded in Defendant's home office records.

For these reasons, the Court finds that Defendant is entitled to summary judgment, based on the undisputed facts before the Court.

C. Michigan Consumer Protection Act ("MCPA") Claim

Neither party specifically [*25] addressed this claim; the motions deal exclusively with the breach of contract claim. However, this claim will be DISMISSED as a matter of law.

The MCPA claim is not viable as a matter of law for two reasons: (1) the insurance transaction was not a "consumer" transaction within the meaning of the MCPA; and (2) there is a genuine legal dispute as to whether Plaintiff is entitled to recover benefits under the policy.

First, the insurance transaction at issue occurred between two businesses-Defendant, and Great Lakes (as owner of the policy). Transactions between businesses which are not "primarily for personal, family, or household purposes" are not within the scope of MCPA. *MICH. COMP. LAWS ANN. § 445.902(d); see also Robertson v. State Farm Fire & Casualty Co., 890 F.Supp. 671, 679 (E.D.Mich.1995)* (opining that there is a limited number of factual situations wherein a corporation's purchase might be considered as primarily for

personal, family, or household purposes). There is no proof, and no allegation, that Great Lakes' purchase of the life insurance policy insuring the life of Decedent, but naming the company as beneficiary, was "primarily for personal, [*26] family, or household purposes."Thus, under *Robertson*, the MCPA claim is not viable as a matter of law.

Second, in *Hardy v. United of Omaha Life Ins. Co., 87 F. Supp .2d 766 (W.D.Mich.1999)* (Quist, J.), the plaintiff filed suit under two causes of action: breach of contract, and violation of the MCPA. The plaintiff was suing to recover under an accidental death benefits plan available through her husband's employer, as her husband had been killed in an automobile accident after leaving a work-related appointment. The court analyzed the plaintiff's breach of contract claim, and found in her favor. The court turned to her MCPA claim, and held:

> [The plaintiff's] Michigan Consumer Protection Act ("MCPA") claim merely restates the claim in Count I for breach of contract resulting from the failure of [the defendant] to pay benefits under the policy. [Her] complaint fails to

> specify any "[u]nfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce" as required under the MCPA, M.C.L. § 445.903(1). As a matter of law, the Court finds that the parties had a genuine legal dispute over the scope of coverage under the policy and that [the defendant's] failure to pay benefits under the policy does not violate the MCPA.

*Id. at 771.*

Likewise, in the instant case, there was a genuine legal dispute as to whether Defendant was liable to Plaintiff under the policy at issue. On the basis of *Hardy*, the Court finds that Defendant's failure to pay benefits under the policy, as a matter of law, does not constitute a violation of the MCPA.

Thus, the Court DISMISSES the MCPA claim.

III. ORDER

For the reasons stated above, the Court hereby GRANTS Defendant's motion and DENIES Plaintiff's motion. The Court also DISMISSES the MCPA claim. This disposes of the case in its entirety.

LET JUDGMENT ENTER ACCORDINGLY.

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Date AUG 19 2002
Detroit, Michigan

# 26 CFR 1.401(a)-20

TITLE 26--INTERNAL REVENUE

CHAPTER I--INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY

(CONTINUED)

PART 1_INCOME TAXES--Table of Contents

Sec. 1.401(a)-20 Requirements of qualified joint and survivor annuity and qualified preretirement survivor annuity.

Q-1: What are the survivor annuity requirements added to the Code by the Retirement Equity Act of 1984 (REA 1984)?

A-1: REA 1984 replaced section 401(a)(11) with a new section 401(a)(11) and added section 417. Plans to which new section 401(a)(11) applies must comply with the requirements of sections 401(a)(11) and 417 in order to remain qualified under sections 401(a) or 403(a). In general, these plans must provide both a qualified joint and survivor annuity (QJSA) and a qualified preretirement survivor annuity (QPSA) to remain qualified. These survivor annuity requirements are applicable to any benefit payable

under a plan, including a benefit payable to a participant under a contract purchased by the plan and paid by a third party.

Q-2: Must annuity contracts purchased and distributed to a participant or spouse by a plan subject to the survivor annuity requirements of sections 401(a)(11) and 417 satisfy the requirements of those sections?

A-2: Yes. Rights and benefits under section 401(a)(11) or 417 may not be eliminated or reduced because the plan uses annuity contracts to provide benefits merely because (a) such a contract is held by a participant or spouse instead of a plan trustee, or (b) such contracts are distributed upon plan termination. Thus, the requirements of sections 401(a)(11) and 417 apply to payments under the annuity contracts, not to the distributions of the contracts.

Q-3: What plans are subject to the survivor annuity requirements of section 401(a)(11)?

A-3: (a) Section 401(a)(11) applies to any defined benefit plan and to any defined contribution plan that is subject to the minimum funding standards of section 412. This section also applies to any

participant under any other defined contribution plan unless all of the following conditions are satisfied--

(1) The plan provides that the participant's nonforfeitable accrued benefit is payable in full, upon the participant's death, to the participant's surviving spouse (unless the participant elects, with spousal consent that satisfies the requirements of section 417(a)(2), that such benefit be provided instead to a designated beneficiary);

(2) The participant does not elect the payment of benefits in the form of a life annuity; and

(3) With respect to the participant, the plan is not a transferee or an offset plan. (See Q&A 5 of this section.)

(b) A defined contribution plan not subject to the minimum funding standards of section 412 will not be treated as satisfying the requirement of paragraph (a)(1) unless both of the following conditions are satisfied–

(1) The benefit is available to the surviving spouse within a reasonable time after the participant's death. For this purpose, availability within the 90-day period following the date of death is deemed to be reasonable and the reasonableness of longer periods shall be determined based on the particular facts and circumstances. A time period longer than 90

days, however, is deemed unreasonable if it is less favorable to the surviving spouse than any time period under the plan that is applicable to other distributions. Thus, for example, the availability of a benefit to the surviving spouse would be unreasonable if the distribution was required to be made by the close of the plan year including the participant's death while distributions to employees who separate from service were required to be made within 90 days of separation.

(2) The benefit payable to the surviving spouse is adjusted for gains or losses occurring after the participant's death in accordance with plan rules governing the adjustment of account balances for other plan distributions. Thus, for example, the plan may not provide for distributions of an account balance to a surviving spouse determined as of the last day of the quarter in which the participant's death occurred with no adjustments of an account balance for gains or losses after death if the plan provides for such adjustments for a participant who separates from service within a quarter.

(c) For purposes of determining the extent to which section 401(a)(11) applies to benefits under an employee stock ownership plan (as defined in section 4975(e)(7)), the portion of a participant's accrued

benefit that is subject to section 409(h) is to be treated as though such benefit were provided under a defined contribution plan not subject to section 412.

(d) The requirements set forth in section 401(a)(11) apply to other employee benefit plans that are covered by applicable provisions under Title I of the Employee Retirement Income Security Act of 1974. For purposes of applying the regulations under sections 401(a)(11) and 417, plans subject to ERISA section 205 are treated as if they were described in section 401(a). For example, to the extent that section 205 covers section 403(b) contracts and custodial accounts they are treated as section 401(a) plans. Individual retirement plans (IRAs), including IRAs to which contributions are made under simplified employee pensions described in section 408(k) and IRAs that are treated as plans subject to Title I, are not subject to these requirements.

Q-4: What rules apply to a participant who elects a life annuity option under a defined contribution plan not subject to section 412?

A-4: If a participant elects at any time (irrespective of the applicable election period defined in section 417(a)(6)) a life annuity option under a defined contribution plan not subject to section 412, the

survivor annuity requirements of sections 401(a)(11) and 417 will always thereafter apply to all of the participant's benefits under such plan unless there is a separate accounting of the account balance subject to the election. A plan may allow a participant to elect an annuity option prior to the applicable election period described in section 417(a)(6). If a participant elects an annuity option, the plan must satisfy the applicable written explanation, consent, election, and withdrawal rules of section 417, including waiver of the QJSA within 90 days of the annuity starting date. If a participant selecting such an option dies, the surviving spouse must be able to receive the QPSA benefit described in section 417(c)(2) which is a life annuity, the actuarial equivalent of which is not less than 50 percent of the nonforfeitable account balance (adjusted for loans as described in Q&A 24(d) of this section). The remaining account balance may be paid to a designated nonspouse beneficiary.

Q-5: How do sections 401(a)(11) and 417 apply to transferee plans which are defined contribution plans not subject to section 412?

A-5: (a) Transferee plans. Although the survivor annuity requirements of sections 401(a)(11) and 417

generally do not apply to defined contribution plans not subject to section 412, such plans are subject to the survivor annuity requirements to the extent that they are transferee plans with respect to any participant. A defined contribution plan is a transferee plan with respect to any participant if the plan is a direct or indirect transferee of such participant's benefits held on or after January 1, 1985, by:

(1) A defined benefit plan,

(2) A defined contribution plan subject to section 412 or

(3) A defined contribution plan that is subject to the survivor annuity requirements of sections 401(a)(11) and 417 with respect to that participant.

If through a merger, spinoff, or other transaction having the effect of a transfer, benefits subject to the survivor annuity requirements of sections 401(a)(11) and 417 are held under a plan that is not otherwise subject to such requirements, such benefits will be subject to the survivor annuity requirements even though they are held under such plan. Even if a plan satisfies the survivor annuity requirements, other rules apply to these transactions. See, e.g., section 411(d)(6) and the regulations thereunder. A transfer

made before January 1, 1985, and any rollover contribution made at any time, are not transactions that subject the transferee plan to the survivor annuity requirements with respect to a participant. If a plan is a transferee plan with respect to a participant, the survivor annuity requirements do not apply with respect to other plan participants solely because of the transfer. Any plan that would not otherwise be subject to the survivor annuity requirements of sections 401(a)(11) and 417 whose benefits are used to offset benefits in a plan subject to such requirements is subject to the survivor annuity requirements with respect to those participants whose benefits are offset. Thus, if a stock bonus or profit-sharing plan offsets benefits under a defined benefit plan, such a plan is subject to the survivor annuity requirements.

(b) Benefits covered. The survivor annuity requirements apply to all accrued benefits held for a participant with respect to whom the plan is a transferee plan unless there is an acceptable separate accounting between the transferred benefits and all other benefits under the plan. A separate accounting is not acceptable unless gains, losses, withdrawals, contributions, forfeitures, and other credits or charges are allocated on a reasonable and consistent

basis between the accrued benefits subject to the survivor annuity requirements and other benefits. If there is an acceptable separate accounting between transferred benefits and any other benefits under the plan, only the transferred benefits are subject to the survivor annuity requirements.

Q-6: Is a frozen or terminated plan required to satisfy the survivor annuity requirements of sections 401(a)(11) and 417?

A-6: In general, benefits provided under a plan that is subject to the survivor annuity requirements of sections 401(a)(11) and 417 must be provided in accordance with those requirements even if the plan is frozen or terminated. However, any plan that has a termination date prior to September 17, 1985, and that distributed all remaining assets as soon as administratively feasible after the termination date, is not subject to the survivor annuity requirements. The date of termination is determined under section 411(d)(3) and Sec. 1.411(d)-2(c).

Q-7: If the Pension Benefit Guaranty Corporation (PBGC) is administering a plan, are benefits payable in the form of a QPSA or QJSA-

A-7: Yes, the PBGC will pay benefits in such forms.

Q-8: How do the survivor annuity requirements of sections 401(a)(11) and 417 apply to participants?

A-8: (a) If a participant dies before the annuity starting date with vested benefits attributable to employer or employee contributions (or both), benefits must be paid to the surviving spouse in the form of a QPSA. If a participant survives until the annuity starting date with vested benefits attributable to employer or employee contributions (or both), benefits must be provided to the participant in the form of a QJSA.

(b) A participant may waive the QPSA or the QJSA (or both) if the applicable notice, election, and spousal consent requirements of section 417 are satisfied.

(c) Benefits are not required to be paid in the form of a QPSA or QJSA if at the time of death or distribution the participant was vested only in employee contributions and such death occurred, or distribution commenced, before October 22, 1986.

(d) Certain mandatory distributions. A distribution may occur without satisfying the spousal consent requirements of section 417 (a) and (e) if the present value of the nonforfeitable benefit does not exceed the cash-out limit in effect underSec. 1.411(a)-11(c)(3)(ii). See Sec. 1.417(e)-1.

Q-9: May separate portions of a participant's accrued benefit be subject to QPSA and QJSA requirements at any particular point in time?

A-9: (a) Dual QPSA and QJSA rights. One portion of a participant's benefit may be subject to the QPSA and another portion to the QJSA requirements at the same time. For example, in order for a money purchase pension plan to distribute any portion of a married participant's benefit to the participant, the plan must distribute such portion in the form of a QJSA (unless the plan satisfies the applicable consent requirements of section 417 (a) and (e) with respect to such portion of the participant's benefit). This rule applies even if the distribution is merely an in-service distribution attributable to voluntary employee contributions and regardless of whether the participant has attained the normal retirement age under the plan. The QJSA requirements apply to such a distribution because the annuity starting date has occurred with respect to this portion of the participant's benefit. In the event of a participant's death following the commencement of a distribution in the form of a QJSA, the remaining payments must be made to the surviving spouse under the QJSA. In addition, the plan must satisfy the QPSA requirements with respect to any portion of the

participant's benefits for which the annuity starting date had not yet occurred.

(b) Example. Assume that participant A has a $100,000 account balance in a money purchase pension plan. A makes an in-service withdrawal of $20,000 attributable to voluntary employee contributions. The QJSA requirements apply to A's withdrawal of the $20,000. Accordingly, unless the QJSA form is properly waived such amount must be distributed in the form of a QJSA. A's remaining account balance ($80,000) remains subject to the QPSA requirements because the annuity starting date has not occurred with respect to the $80,000. (If A survives until the annuity starting date, the $80,000 would be subject to the QJSA requirements.) If A died on the day following the annuity starting date for the withdrawal, A's spouse would be entitled to a QPSA with a value equal to at least $40,000 with respect to the $80,000 account balance, in addition to any survivor benefit without respect to the $20,000. If the $20,000 payment to A had been the first payment of an annuity purchased with the entire $100,000 account balance rather than an in-service distribution, then the QJSA requirements would apply to the entire account balance at the time of the annuity starting date. In such event, the plan would

have no obligation to provide A's spouse with a QPSA benefit upon A's death. Of course, A's spouse would receive the QJSA benefit (if the QJSA had not been waived) based on the full $100,000.

Q-10: What is the relevance of the annuity starting date with respect to the survivor benefit requirements?

A-10: (a) Relevance. The annuity starting date is relevant to whether benefits are payable as either a QJSA or QPSA, or other selected optional form of benefit. If a participant is alive on the annuity starting date, the benefits must be payable as a QJSA. If the participant is not alive on the annuity starting date, the surviving spouse must receive a QPSA. The annuity starting date is also used to determine when a spouse may consent to and a participant may waive a QJSA. A waiver is only effective if it is made 90 days before the annuity starting date. Thus, a deferred annuity cannot be selected and a QJSA waived until 90 days before payments commence under the deferred annuity. In some cases, the annuity starting date will have occurred with respect to a portion of the participant's accrued benefit and will not have occurred with respect to the remaining portion. (See Q&A-9.)

(b) Annuity starting date--(1) General rule. For purposes of sections 401(a)(11), 411(a)(11) and 417, the annuity starting date is the first day of the first period for which an amount is paid as an annuity or any other form.

(2) Annuity payments. The annuity starting date is the first date for which an amount is paid, not the actual date of payment. Thus, if participant A is to receive annuity payments as of the first day of the first month after retirement but does not receive any payments until three months later, the annuity starting date is the first day of the first month. For example, if an annuity is to commence on January 1, January 1 is the annuity starting date even though the payment for January is not actually made until a later date. In the case of a deferred annuity, the annuity starting date is the date for which the annuity payments are to commence, not the date that the deferred annuity is elected or the date the deferred annuity contract is distributed.

(3) Administrative delay. A payment shall not be considered to occur after the annuity starting date merely because actual payment is reasonably delayed for calculation of the benefit amount if all payments are actually made.

(4) Forfeitures on death. Prior to the annuity starting date, section 411(a)(3)(A) allows a plan to provide for a forfeiture of a participant's benefit, except in the case of a QPSA or a spousal benefit described in section 401(a)(11)(B)(iii)(I). Once the annuity starting date has occurred, even if actual payment has not yet been made, a plan must pay the benefit in the distribution form elected.

(5) Surviving spouses, alternate payees, etc. The definition of "annuity starting date" for surviving spouses, other beneficiaries and alternate payees under section 414(p) is the same as it is for participants.

(c) Disability auxiliary benefit--(1) General rule. The annuity starting date for a disability benefit is the first day of the first period for which the benefit becomes payable unless the disability benefit is an auxiliary benefit. The payment of any auxiliary disability benefits is disregarded in determining the annuity starting date. A disability benefit is an auxiliary benefit if upon attainment of early or normal retirement age, a participant receives a benefit that satisfies the accrual and vesting rules of section 411 without taking into account the disability benefit payments up to that date.

Example. (i) Assume that participant A at age 45 is entitled to a vested accrued benefit of $100 per month commencing at age 65 in the form of a joint and survivor annuity under Plan X. If prior to age 65 A receives a disability benefit under Plan X and the payment of such benefit does not reduce the amount of A's retirement benefit of $100 per month commencing at age 65, any disability benefit payments made to A between ages 45 and 65 are auxiliary benefits. Thus, A's annuity starting date does not occur until A attains age 65. A's surviving spouse B would be entitled to receive a QPSA if A died before age 65. B would be entitled to receive the survivor portion of a QJSA (unless waived) if A died after age 65. The QPSA payable to B upon A's death prior to age 65 would be computed by reference to the QJSA that would have been payable to A and B had A survived to age 65.

(ii) If in the above example A's benefit payable at age 65 is reduced to $99 per month because a disability benefit is provided to A prior to age 65, the disability benefit would not be an auxiliary benefit. The benefit of $99 per month payable to A at age 65 would not, without taking into account the disability benefit payments to A prior to age 65, satisfy the minimum vesting and accrual rules of section 411.

Accordingly, the first day of the first period for which the disability payments are to be made to A would constitute A's annuity starting date, and any benefit paid to A would be required to be paid in the form of a QJSA (unless waived by A with the consent of B).

(d) Other rules--(1) Suspension of benefits. If benefit payments are suspended after the annuity starting date pursuant to a suspension of benefits described in section 411(a)(3)(B) after an employee separates from service, the recommencement of benefit payments after the suspension is not treated as a new annuity starting date unless the plan provides otherwise. In such case, the plan administrator is not required to provide new notices nor to obtain new waivers for the recommenced distributions if the form of distribution is the same as the form that was appropriately selected prior to the suspension. If benefits are suspended for an employee who continues in service without a separation and who never receives payments, the commencement of payments after the period of suspension is treated as the annuity starting date unless the plan provides otherwise.

(2) Additional accruals. In the case of an annuity starting date that occurs on or after normal

retirement age, such date applies to any additional accruals after the annuity starting date, unless the plan provides otherwise. For example, if a participant who continues to accrue benefits elects to have benefits paid in an optional form at normal retirement age, the additional accruals must be paid in the optional form selected unless the plan provides otherwise. In the case of an annuity starting date that occurs prior to normal retirement age, such date does not apply to any additional accruals after such date.

Q-11: Do the survivor annuity requirements apply to benefits derived from both employer and employee contributions?

A-11: Yes. The survivor annuity benefit requirements apply to benefits derived from both employer and employee contributions. Benefits are not required to be paid in the form of a QPSA or a QJSA if the participant was vested only in employee contributions at the time of death or distribution and such death or distribution occurred before October 22, 1986. All benefits provided under a plan, including benefits attributable to rollover contributions, are subject to the survivor annuity requirements.

Q-12: To what benefits do the survivor annuity requirements of sections 401(a)(11) and 417 apply?

A-12: (a) Defined benefit plans. Under a defined benefit plan, sections 401(a)(11) and 417 apply only to benefits in which a participant was vested immediately prior to death. They do not apply to benefits to which a participant's beneficiary becomes entitled by reason of death or to the proceeds of a life insurance contract to the extent such proceeds exceed the present value of the participant's nonforfeitable benefits that existed immediately prior to death.

(b) Defined contribution plans. Sections 401(a)(11) and 417 apply to all nonforfeitable benefits which are payable under a defined contribution plan, whether nonforfeitable before or upon death, including the proceeds of insurance contracts.

Q-13: Does the rule of section 411(a)(3)(A) which permits forfeitures on account of death apply to a QPSA or the spousal benefit described in section 401(a)(11)(B)(iii)?

A-13: No. Section 411(a)(3)(A) permits forfeiture on account of death prior to the time all the events fixing payment occur. However, this provision does not operate to deprive a surviving spouse of a QPSA or the spousal benefit described in section

401(a)(11)(B)(iii). Therefore, sections 401(a)(11) and 417 apply to benefits that were nonforfeitable immediately prior to death (determined without regard to section 411(a)(3)(A)). Thus, in the case of the death of a married participant in a defined contribution plan not subject to section 412 which provides that, upon a participant's death, the entire nonforfeitable accrued benefit is payable to the participant's spouse, the nonforfeitable benefit is determined without regard to the provisions of section 411(a)(3)(A).

Q-14: Do sections 411(a)(11), 401(a)(11) and 417 apply to accumulated deductible employee contributions, as defined in section 72(o)(5)(B) (Accumulated DECs)?

A-14: (a) Employee consent, section 411. The requirements of section 411(a)(11) apply to Accumulated DECs. Thus, Accumulated DECs may not be distributed without participant consent unless the applicable exemptions apply.

(b) Survior requirements. Accumulated DECs are treated as though held under a separate defined contribution plan that is not subject to section 412. Thus, section 401(a)(11) applies to Accumulated DECs only as provided in section 401(a)(11)(B)(iii).

All Accumulated DECs are treated in this manner, including Accumulated DECs that are the only benefit held under a plan and Accumulated DECs that are part of a defined benefit or a defined contribution plan.

(c) Effective date. Sections 401(a)(11) and 411(a)(11) shall not apply to distributions of accumulated DECs until the first plan year beginning after December 31, 1988.

Q-15: How do the survivor annuity requirements of sections 401(a)(11) and 417 apply to a defined benefit plan that includes an accrued benefit based upon a contribution to a separate account or mandatory employee contributions?

A-15: (a) 414(k) plans. In the case of a section 414(k) plan that includes both a defined benefit plan and a separate account, the rules of sections 401(a)(11) and 417 apply separately to the defined benefit portion and the separate account portion of the plan. The separate account portion is subject to the survivor annuity requirements of sections 401(a)(11) and 417 and the special QPSA rules in section 417(c)(2).

(b) Employee contributions--(1) Voluntary. In the case of voluntary employee contributions to a defined

benefit plan, the plan must maintain a separate account with respect to the voluntary employee contributions. This separate account is subject to the survivor annuity requirements of sections 401(a)(11) and 417 and the special QPSA rules in section 417(c)(2).

(2) Mandatory. In the case of a defined benefit plan providing for mandatory employee contributions, the entire accrued benefit is subject to the survivor annuity requirements of sections 401(a)(11) and 417 as a defined benefit plan.

(c) Accumulated DECs. See Q&A 14 of this section for the rule applicable to accumulated deductible employee contributions.

Q-16: Can a plan provide a benefit form more valuable than the QJSA and if a plan offers more than one annuity option satisfying the requirements of a QJSA, is spousal consent required when the participant chooses among the various forms?

A-16: In the case of an unmarried participant, the QJSA may be less valuable than other optional forms of benefit payable under the plan. In the case of a married participant, the QJSA must be at least as valuable as any other optional form of benefit payable under the plan at the same time. Thus, if a

plan has two joint and survivor annuities that would satisfy the requirements for a QJSA, but one has a greater actuarial value than the other, the more valuable joint and survivor annuity is the QJSA. If there are two or more actuarially equivalent joint and survivor annuities that satisfy the requirements for a QJSA, the plan must designate which one is the QJSA and, therefore, the automatic form of benefit payment. A plan, however, may allow a participant to elect out of such a QJSA, without spousal consent, in favor of another actuarially equivalent joint and survivor annuity that satisfies the QJSA conditions. Such an election is not subject to the requirement that it be made within the 90-day period before the annuity starting date. For example, if a plan designates a joint and 100% survivor annuity as the QJSA and also offers an actuarially equivalent joint and 50% survivor annuity that would satisfy the requirements of a QJSA, the participant may elect the joint and 50% survivor annuity without spousal consent. The participant, however, does need spousal consent to elect a joint and survivor annuity that was not actuarially equivalent to the automatic QJSA.

Q-17: When must distributions to a participant under a QJSA commence?

A-17: (a) QJSA benefits upon earliest retirement. A plan must permit a participant to receive a distribution in the form of a QJSA when the participant attains the earliest retirement age under the plan. Written consent of the participant is required. However, the consent of the participant's spouse is not required. Any payment not in the form of a QJSA is subject to spousal consent. For example, if the participant separates from service under a plan that allows for distributions on separation from service or if a plan allows for in-service distributions, the participant may receive a QJSA without spousal consent in such events. Payments in any other form, including a single sum, would require waiver of the QJSA by the participant's spouse.

(b) Earliest retirement age. (1) This paragraph (b) defines the term "earliest retirement age" for purposes of sections 401(a)(11), 411(a)(11) and 417.

(2) In the case of a plan that provides for voluntary distributions that commence upon the participant's separation from service, earliest retirement age is the earliest age at which a participant could separate from service and receive a distribution. Death of a participant is treated as a separation from service.

(3) In the case of a plan that provides for in-service distributions, earliest retirement age is the earliest age at which such distributions may be made.

(4) In the case of a plan not described in subparagraph (2) or (3) of this paragraph, the rule below applies. Earliest retirement age is the early retirement age determined under the plan, or if no early retirement age, the normal retirement age determined under the plan. If the participant dies or separates from service before such age, then only the participant's actual years of service at the time of the participant's separation from service or death are taken into account. Thus, in the case of a plan under which benefits are not payable until the attainment of age 65, or upon attainment of age 55 and completion of 10 years of service, the earliest retirement age of a participant who died or separated from service with 8 years of service is when the participant would have attained age 65 (if the participant had survived). On the other hand, if a participant died or separated from service after 10 years of service, the earliest retirement age is when the participant would have attained age 55 (if the participant had survived).

Q-18: What is a qualified preretirement survivor annuity (QPSA) in a defined benefit plan?

A-18: A QPSA is an immediate annuity for the life of the surviving spouse of a participant. Each payment under a QPSA under a defined benefit plan is not to be less than the payment that would have been made to the survivor under the QJSA payable under the plan if (a) in the case of a participant who dies after attaining the earliest retirement age under the plan, the participant had retired with a QJSA on the day before the participant's death, and (b) in the case of a participant who dies on or before the participant's earliest retirement age under the plan, the participant had separated from service at the earlier of the actual time of separation or death, survived until the earliest retirement age, retired at that time with a QJSA, and died on the day thereafter. If the participant elects before the annuity starting date a form of joint and survivor annuity that satisfies the requirements for a QJSA and dies before the annuity starting date, the elected form is treated as the QJSA and the QPSA must be based on such form.

Q-19: What rules apply in determining the amount and forfeitability of a QPSA?

A-19: The QPSA is calculated as of the earliest retirement age if the participant dies before such time, or at death if the participant dies after the earliest retirement age. The plan must make reasonable actuarial adjustments to reflect a payment earlier or later than the earliest retirement age. A defined benefit plan may provide that the QPSA is forfeited if the spouse does not survive until the date prescribed under the plan for commencement of the QPSA (i.e., the earliest retirement age). Similarly, if the spouse survives past the participant's earliest retirement age (or other earlier QPSA distribution date under the plan) and elects after the death of the participant to defer the commencement of the QPSA to a later date, a defined benefit plan may provide for a forfeiture of the QPSA benefit if the spouse does not survive until the deferred commencement date. The account balance in a defined contribution plan may not be forfeited even though the spouse does not survive until the time the account balance is used to purchase the QPSA. See Q&A-17 of this section for the meaning of earliest retirement age.

Q-20: What preretirement survivor annuity benefits must a defined contribution plan subject to

the survivor annuity requirements of sections 401(a)(11) and 417 provide?

A-20: A defined contribution plan that is subject to the survivor annuity requirements of sections 401(a)(11) and 417 must provide a preretirement survivor annuity with a value which is not less than 50 percent of the nonforfeitable account balance of the participant as of the date of the participant's death. If a contributory defined contribution plan has a forfeiture provision permitted by section 411(a)(3)(A), not more than a proportional percent of the account balance attributable to contributions that may not be forfeited at death (for example, employee and section 401(k) contributions) may be used to satisfy the QPSA benefit. Thus, for example, if the QPSA benefit is to be provided from 50 percent of the account balance, not more than 50 percent of the nonforfeitable contributions may be used for the QPSA.

Q-21: May a defined benefit plan charge the participant for the cost of the QPSA benefit?

A-21: Prior to the later of the time the plan allows the participant to waive the QPSA or provides notice of the ability to waive the QPSA, a defined benefit plan may not charge the participant for the cost of

the QPSA by reducing the participant's plan benefits or by any other method. The preceding sentence does not apply to any charges prior to the first plan year beginning after December 31, 1988. Once the participant is given the opportunity to waive the QPSA or the notice of the QPSA is later, the plan may charge the participant for the cost of the QPSA. A charge for the QPSA that reasonably reflects the cost of providing the QPSA will not fail to satisfy section 411 even if it reduces the accrued benefit.

Q-22: When must distributions to a surviving spouse under a QPSA commence?

A-22: (a) In the case of a defined benefit plan, the plan must permit the surviving spouse to direct the commencement of payments under QPSA no later than the month in which the participant would have attained the earliest retirement age. However, a plan may permit the commencement of payments at an earlier date.

(b) In the case of a defined contribution plan, the plan must permit the surviving spouse to direct the commencement of payments under the QPSA within a reasonable time after the participant's death.

Q-23: Must a defined benefit plan obtain the consent of a participant and the participant's spouse to commence payments in the form of a QJSA in order to avoid violating section 415 or 411(b)?

A-23: No. A defined benefit plan may commence distributions in the form of a QJSA without the consent of the participant and spouse, even if consent would otherwise be required (see Sec. 1.417(e)-1(b)), to the extent necessary to avoid a violation of section 415 or 411(b). For example, assume a plan has a normal retirement age of 55. A is a married participant, age 55, and has accrued a $75,000 joint and 100 percent survivor annuity that satisfies section 415. If an actuarial increase would be required under section 411 because of deferred commencement and the increase would cause the benefit to exceed the applicable limit under section 415, the plan may commence payment of a QJSA at age 55 without the participant's election or consent and without the spouse's consent.

Q-24: What are the rules under sections 401(a)(11) and 417 applicable to plan loans?

A-24: (a) Consent rules. (1) A plan does not satisfy the survivor annuity requirements of sections 401(a)(11) and 417 unless the plan provides that, at

the time the participant's accrued benefit is used as security for a loan, spousal consent to such use is obtained. Consent is required even if the accrued benefit is not the primary security for the loan. No spousal consent is necessary if, at the time the loan is secured, no consent would be required for a distribution under section 417(a)(2)(B). Spousal consent is not required if the plan or the participant is not subject to section 401(a)(11) at the time the accrued benefit is used as security, or if the total accrued benefit subject to the security is not in excess of the cash-out limit in effect under Sec. 1.411(a)-11(c)(3)(ii). The spousal consent must be obtained no earlier than the beginning of the 90-day period that ends on the date on which the loan is to be so secured. The consent is subject to the requirements of section 417(a)(2). Therefore, the consent must be in writing, must acknowledge the effect of the loan and must be witnessed by a plan representative or a notary public.

(2) Participant consent is deemed obtained at the time the participant agrees to use his accrued benefit as security for a loan for purposes of satisfying the requirements for participant consent under sections 401(a)(11), 411(a)(11) and 417.

(b) Change in status. If spousal consent is obtained or is not required under paragraph (a) of this Q&A 24 at the time the benefits are used as security, spousal consent is not required at the time of any setoff of the loan against the accrued benefit resulting from a default, even if the participant is married to a different spouse at the time of the setoff. Similarly, in the case of a participant who secured a loan while unmarried, no consent is required at the time of a setoff of the loan against the accrued benefit even if the participant is married at the time of the setoff.

(c) Renegotiation. For purposes of obtaining any required spousal consent, any renegotiation, extension, renewal, or other revision of a loan shall be treated as a new loan made on the date of the renegotiation, extension, renewal, or other revision.

(d) Effect on benefits. For purposes of determining the amount of a QPSA or QJSA, the accrued benefit of a participant shall be reduced by any security interest held by the plan by reason of a loan outstanding to the participant at the time of death or payment, if the security interest is treated as payment in satisfaction of the loan under the plan. A plan may offset any loan outstanding at the participant's death which is secured by the participant's account balance against the spousal

benefit required to be paid under section 401(a)(11)(B)(iii).

(e) Effective date. Loans made prior to August 19, 1985, are deemed to satisfy the consent requirements of paragraph (a) of this Q&A 24.

Q-25: How do the survivor annuity requirements of sections 401(a)(11) and 417 apply with respect to participants who are not married or to surviving spouses and participants who have a change in marital status?

A-25: (a) Unmarried participant rule. Plans subject to the survivor annuity requirements of sections 401(a)(11) and 417 must satisfy those requirements applicable to QJSAs with respect to participants who are not married. A QJSA for a participant who is not married is an annuity for the life of the participant. Thus, an unmarried participant must be provided the written explanation described in section 417(a)(3)(A) and a single life annuity unless another form of benefit is elected by the participant. An unmarried participant is deemed to have waived the QPSA requirements. This deemed waiver is null and void if the participant later marries.

(b) Marital status change.--(1) Remarriage. If a participant is married on the date of death, payments

to a surviving spouse under a QPSA or QJSA must continue even if the surviving spouse remarries.

(2) One-year rule. (i) A plan is not required to treat a participant as married unless the participant and the participant's spouse have been married throughout the one-year period ending on the earlier of (A) the participant's annuity starting date or (B) the date of the participant's death. Nevertheless, for purposes of the preceding sentence, a participant and the participant's spouse must be treated as married throughout the one-year period ending on the participant's annuity starting date even though they are married to each other for less than one year before the annuity starting date if they remain married to each other for at least one year. See section 417(d)(2). If a plan adopts the one-year rule provided in section 417(d), the plan must treat the participant and spouse who are married on the annuity starting date as married and must provide benefits which are to commence on the annuity starting date in the form of a QJSA unless the participant (with spousal consent) elects another form of benefit. The plan is not required to provide the participant with a new or retroactive election or the spouse with a new consent when the one-year period is satisfied. If the participant and the spouse

do not remain married for at least one year, the plan may treat the participant as having not been married on the annuity starting date. In such event, the plan may provide that the spouse loses any survivor benefit right; further, no retroactive correction of the amount paid the participant is required.

(ii) Example. Plan X provides that participants who are married on the annuity starting date for less than one year are treated as unmarried participants. Plan X provides benefits in the form of a QJSA or an optional single sum distribution. Participant A was married 6 months prior to the annuity starting date. Plan X must treat A as married and must commence payments to A in the form of a QJSA unless another form of benefit is elected by A with spousal consent. If a QJSA is paid and A is divorced from his spouse S, within the first year of the marriage, S will no longer have any survivor rights under the annuity (unless a QDRO provides otherwise). If A continues to be married to S, and A dies within the one-year period, Plan X may treat A as unmarried and forfeit the OJSA benefit payable to S.

(3) Divorce. If a participant divorces his spouse prior to the annuity starting date, any elections made while the participant was married to his former spouse remain valid, unless otherwise provided in a

QDRO, or unless the participant changes them or is remarried. If a participant dies after the annuity starting date, the spouse to whom the participant was married on the annuity starting date is entitled to the QJSA protection under the plan. The spouse is entitled to this protection (unless waived and consented to by such spouse) even if the participant and spouse are not married on the date of the participant's death, except as provided in a QDRO.

Q-26: In the case of a defined contribution plan not subject to section 412, does the requirement that a participant's nonforfeitable accrued benefit be payable in full to a surviving spouse apply to a spouse who has been married to the participant for less than one year?

A-26: A plan may provide that a spouse who has not been married to a participant throughout the one-year period ending on the earlier of (a) the participant's annuity starting date or (b) the date of the participant's death is not treated as a surviving spouse and is not required to receive the participant's account balance. The special exception described in section 417(d)(2) and Q&A 25 of this section does not apply.

Q-27: Are there circumstances when spousal consent to a participant's election to waive the QJSA or the QPSA is not required?

A-27: Yes. If it is established to the satisfaction of a plan representative that there is no spouse or that the spouse cannot be located, spousal consent to waive the QJSA or the QPSA is not required. If the spouse is legally incompetent to give consent, the spouse's legal guardian, even if the guardian is the participant, may give consent. Also, if the participant is legally separated or the participant has been abandoned (within the meaning of local law) and the participant has a court order to such effect, spousal consent is not required unless a QDRO provides otherwise. Similar rules apply to a plan subject to the requirements of section 401(a)(11)(B)(iii)(I).

Q-28: Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417?

A-28: No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.

Q-29: If a participant's spouse consents under section 417(a)(2)(A) to the participant's waiver of a survivor annuity form of benefit, is a subsequent spouse of the same participant bound by the consent?

A-29: No. A consent under section 417(a)(2)(A) by one spouse is binding only with respect to the consenting spouse. See Q&A-24 of this section for an exception in the case of plan benefits securing plan loans.

Q-30: Does the spousal consent requirement of section 417(a)(2)(A) require that a spouse's consent be revocable?

A-30: No. A plan may preclude a spouse from revoking consent once it has been given. Alternatively, a plan may also permit a spouse to revoke a consent after it has been given, and thereby to render ineffective the participant's prior election not to receive a QPSA or QJSA. A participant must always be allowed to change his election during the applicable election period. Spousal consent is required in such cases to the extent provided in Q&A 31, except that spousal consent is never required for a QJSA or QPSA.

Q-31: What rules govern a participant's waiver of a QPSA or QJSA under section 417(a)(2)?

A-31: (a) Specific beneficiary. Both the participant's waivers of a QPSA and QJSA and the spouse's consents thereto must state the specific nonspouse beneficiary (including any class of beneficiaries or any contingent beneficiaries) who will receive the benefit. Thus, for example, if spouse B consents to participant A's election to waive a QPSA, and to have any benefits payable upon A's death before the annuity starting date paid to A's children, A may not subsequently change beneficiaries without the consent of B (except if the change is back to a QPSA). If the designated beneficiary is a trust, A's spouse need only consent to the designation of the trust and need not consent to the designation of trust beneficiaries or any changes of trust beneficiaries.

(b) Optional form of benefit--(1) QJSA. Both the participant's waiver of a QJSA (and any required spouse's consent thereto) must specify the particular optional form of benefit. The participant who has waived a QJSA with the spouse's consent in favor of another form of benefit may not subsequently change the optional form of benefit without obtaining the spouse's consent (except back to a QJSA). Of course, the participant may change the form of benefit if the

plan so provides after the spouse's death or a divorce (other than as provided in a QDRO). A participant's waiver of a QJSA (and any required spouse's consent thereto) made prior to the first plan year beginning after December 31, 1986, is not required to specify the optional form of benefit.

(2) QPSA. A participant's waiver of a QPSA and the spouse's consent thereto are not required to specify the optional form of any preretirement benefit. Thus, a participant who waives the QPSA with spousal consent may subsequently change the form of the preretirement benefit, but not the nonspouse beneficiary, without obtaining the spouse's consent.

(3) Change in form. After the participant's death, a beneficiary may change the optional form of survivor benefit as permitted by the plan.

(c) General consent. In lieu of satisfying paragraphs (a) and (b) of this Q&A 31, a plan may permit a spouse to execute a general consent that satisfies the requirements of this paragraph (c). A general consent permits the participant to waive a QPSA or QJSA, and change the designated beneficiary or the optional form of benefit payment without any requirement of further consent by such spouse. No general consent is valid unless the

general consent acknowledges that the spouse has the right to limit consent to a specific beneficiary and a specific optional form of benefit, where applicable, and that the spouse voluntarily elects to relinquish both of such rights. Notwithstanding the previous sentence, a spouse may execute a general consent that is limited to certain beneficiaries or forms of benefit payment. In such case, paragraphs (a) and (b) of this Q&A 31 shall apply to the extent that the limited general consent is not applicable and this paragraph (c) shall apply to the extent that the limited general consent is applicable. A general consent, including a limited general consent, is not effective unless it is made during the applicable election period. A general consent executed prior to October 22, 1986 does not have to satisfy the specificity requirements of this Q&A 31.

Q-32: What rules govern a participant's waiver of the spousal benefit under section 401(a)(11)(B)?

A-32: (a) Application. In the case of a defined contribution plan that is not subject to the survivor annuity requirements of sections 401(a)(11) and 417, a participant may waive the spousal benefit of section 401(a)(11)(B)(iii) if the conditions of paragraph (b) are satisfied. In general, a spousal benefit is the

nonforfeitable account balance on the participant's date of death.

(b) Conditions. In general, the same conditions, other than the age 35 requirement, that apply to the participant's waiver of a QPSA and the spouse's consent thereto apply to the participant's waiver of the spousal benefit and the spouse's consent thereto. See Q&A-31. Thus, the participant's waiver of the spousal benefit must state the specific nonspouse beneficiary who will receive such benefit. The waiver is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not the nonspouse beneficiary, without obtaining the spouse's consent.

Q-33: When and in what manner, may a participant waive a spousal benefit or a QPSA?

A-33: (a) Plans not subject to section 401(a)(11). A participant in a plan that is not subject to the survivor annuity requirements of section 401(a)(11) (because of subparagraph (B)(iii) thereof) may waive the spousal benefit at any time, provided that no such waiver shall be effective unless the spouse has consented to the waiver. The spouse may consent to a waiver of the spousal benefit at any time, even prior to the participant's attaining age 35. No spousal

consent is required for a payment to the participant or the use of the accrued benefit as security for a plan loan to the participant.

(b) Plans subject to section 401(a)(11). A participant in a plan subject to the survivor annuity requirements of section 401(a)(11) generally may waive the QPSA benefit (with spousal consent) only on or after the first day of the plan year in which the participant attains age 35. However, a plan may provide for an earlier waiver (with spousal consent), provided that a written explanation of the QPSA is given to the participant and such waiver becomes invalid upon the beginning of the plan year in which the participant's 35th birthday occurs. If there is no new waiver after such date, the participant's spouse must receive the QPSA benefit upon the participant's death.

Q-34: Must the written explanations required by section 417(a)(3) be provided to nonvested participants?

A-34: Such written explantions must be provided to nonvested participants who are employed by an employer maintaining the plan. Thus, they are not required to be provided to those nonvested

participants who are no longer employed by such an employer.

Q-35: When must a plan provide the written explanation, required by section 417(a)(3)(B), of the QPSA to a participant?

A-35: (a) General rule. A plan must provide the written explanation of the QPSA to a participant within the applicable period. Except as provided in paragraph (b), the applicable period means, with respect to a participant, whichever of the following periods ends last:

(1) The period beginning with the first day of the plan year in which the participant attains age 32 and ending with the close of the plan year preceding the plan year in which the participant attains age 35.

(2) A reasonable period ending after the individual becomes a participant.

(3) A reasonable period ending after the QPSA is no longer fully subsidized.

(4) A reasonable period ending after section 401(a)(11) first applies to the participant. Section 401(a)(11) would first apply when a benefit is transferred from a plan not subject to the survivor annuity requirements of section 401(a)(11) to a plan subject to such section or at the time of an election of

an annuity under a defined contribution plan described in section 401(a)(11)(B)(iii).

(b) Pre-35 separations. In the case of a participant who separates from service before attaining age 35, the applicable period means the period beginning one year before the separation from service and ending one year after such separation. If such a participant returns to service, the plan must also comply with pragraph (a).

(c) Reasonable period For purposes of applying paragraph (a), a reasonable period ending after the enumerated events described in paragraphs (a) (2), (3) and (4) is the end of the one-year period beginning with the date the applicable event occurs. The applicable period for such events begins one year prior to the occurrence of the enumerated events.

(d) Transition rule. In the case of an individual who was a participant in the plan on August 23, 1984, and, as of that date had attained age 34, the plan will satisfy the requriement of section 417(a)(3)(B) if it provided the explanation not later than December 31, 1985.

Q-36: How do plans satisfy the requirements of providing participants explanations of QPSAs and QJSAs?

A-36. For rules regarding the explanation of QPSAs and QJSAs required under section 417(a)(3), see Sec. 1.417(a)(3)-1.

Q-37: What are the consequences of fully subsidizing the cost of either a QJSA or a QPSA in accordance with section 417(a)(5)?

A-37: If a plan fully subsidizes a QJSA or QPSA in accordance with section 417(a)(5) and does not allow a participant to waive such QJSA or QPSA or to select a nonspouse beneficiary, the plan is not required to provide the written explanation required by section 417(a)(3). However, if the plan offers an election to waive the benefit or designate a beneficiary, it must satisfy the election, consent, and notice requirements of section 417(a) (1), (2), and (3), with respect to such subsidized QJSA or QPSA, in accordance with section 417(a)(5).

Q-38: What is a fully subsidized benefit?

A-38: (a) QJSA--(1) General rule. A fully subsidized QJSA is one under which no increase in cost to, or decrease in actual amounts received by, the participant may result from the participant's failure to elect another form of benefit.

(2) Examples.

Example (1). If a plan provides a joint and survivor annuity and a single sum option, the plan does not fully subsidize the joint and survivor annuity, regardless of the actuarial value of the joint and survivor annuity because, in the event of the participant's early death, the participant would have received less under the annuity than he would have received under the single sum option.

Example (2) . If a plan provides for a life annuity of $100 per month and a joint and 100% survivor benefit of $99 per month, the plan does not fully subsidize the joint and survivor benefit.

(b) QPSA. A QPSA is fully subsidized if the amount of the participant's benefit is not reduced because of the QPSA coverage and if no charge to the participant under the plan is made for the coverage. Thus, a QPSA is fully subsidized in a defined contribution plan.

Q-39: When do the survivor annuity requirements of sections 401(a)(11) and 417 apply to plans?

A-39: Sections 401(a)(11) and 417 generally apply to plan years beginning after December 31, 1984. Sections 302 and 303 of REA 1984 provide specific effective dates and transitional rules under which the

QJSA or QPSA (or pre-REA 1984 section 401(a)(11)) requirements may be applicable to particular plans or with respect to benefits provided to (as amended by REA 1984) particular participants. In general, the section 401(a)(11) (as amended by REA 1984) survivor annuity requirements do not apply with respect to a participant who does not have at least one hour of service or one hour of paid leave under the plan after August 22, 1984.

Q-40: Are there special effective dates for plans maintained pursuant to collective bargaining agreements?

A-40: Yes. Section 302(b) of REA 1984 as amended by section 1898(g) of the Tax Reform Act of 1986 provides a special deferred effective date for such plans. Whether a plan is described in section 302(b) of REA 1984 is determined under the principles applied under section 1017(c) of the Employee Retirement Income Security Act of 1974. See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 266 (1974). In addition, a plan will not be treated as maintained under a collective bargaining agreement unless the employee representatives satisfy section 7701(a)(46) of the Internal Revenue Code after March 31, 1984. See Sec. 301.7701-17T for other requirements for a

plan to be considered to be collectively bargained. Nothing in section 302(b) of REA 1984 denies a participant or spouse the rights set forth in sections 303(c)(2), 303(c)(3), 303(e)(1), and 303(e)(2) of REA 1984.

Q-41: What is one hour of service or paid leave under the plan for purposes of the transition rules in section 303 of REA 1984?

A-41: One hour of service or paid leave under the plan is one hour of service or paid leave recognized or required to be recognized under the plan for any purpose, e.g., participation, vesting percentage, or benefit accrual purposes. For plans that do not compute hours of service, one hour of service or paid leave means any service or paid leave recognized or required to be recognized under the plan for any purpose.

Q-42: Must a plan be amended to provide for the QPSA required by section 303(c)(2) of REA 1984, or for the survivor annuities required by section 303(e) of REA 1984?

A-42: A plan will not fail to satisfy the qualification requirements of section 401(a) or 403(a) merely because it is not amended to provide the QPSA

required by section 303(c)(2) or the survivor annuities required by section 303(e). The plan must, however, satisfy those requirements in operation.

Q-43: Is a participant's election, or a spouse's consent to an election, with respect to a QPSA, made before August 23, 1984, valid?

A-43: No.

Q-44: Is spousal consent required for certain survivor annuity elections made by the participant after December 31, 1984, and before the first plan year to which new sections 401(a)(11) and 417 apply?

A-44: Yes. Section 303(c)(3) of REA 1984 provides that any election not to take a QJSA made after December 31, 1984, and before the date sections 401(a)(11) and 417 apply to the plan by a participant who has 1 hour of service or leave under the plan after August 23, 1984, is not effective unless the spousal consent requirements of section 417 are met with respect to such election. Unless the participant's annuity starting date occurred before January 1, 1985, the spousal consent required by section 417 (a)(2) and (e) must be obtained even though the participant elected the benefit prior to January 1, 1985. The plan is not required to be amended to

comply with section 303(c)(3) of REA 1984, but the plan must satisfy this requirement in operation.

Q-45: Are there special rules for certain participants who separated from service prior to August 23, 1984?

A-45: Yes. Section 303(e) of REA 1984 provides special rules for certain participants who separated from service before August 23, 1984. Section 303(e)(1), which applies only to plans subject to section 401(a)(11) of the Code (as in effect on August 22, 1984), provides that participants whose annuity starting date did not occur before August 24, 1984, and who had one hour of service on or after September 2, 1974, but not in a plan year beginning after December 31, 1975, may elect to receive the benefits required to be provided under section 401(a)(11) of the Code (as in effect on August 22, 1984). Section 303(e)(2) provides that certain participants who had one hour of service in a plan year beginning on or after January 1, 1976, but not after August 22, 1984, may elect QPSA coverage under new sections 401(a)(11) and 417 in plans subject to these provisions. Section 303(e)(4)(A) requires plans or plan administrators to notify those participants of the provisions of section 303(e).

Q-46: When must a plan provide the notice required by section 303(e)(4)(A) of REA 1984?

A-46: The notice required by section 303(e)(4)(A) must be provided no later than the earlier of:

(a) The date the first summary annual report provided after September 17, 1985, is distributed to participants; or

(b) September 30, 1985.

A plan will not fail to satisfy the preceding sentence if the plan provides a fully subsidized QPSA with respect to any participant described in section 303(e) who dies on or after July 19, 1985, and before the notice is received. If the plan ceases to fully subsidize the QPSA, the cessation must not be effective until the notice is given. For This purpose, an annuity payable to a nonspouse beneficiary elected by the participant, in lieu of a spouse, shall satisfy the QPSA requirement, so long as the survivor benefit is fully subsidized. The notice required by this paragraph must be in writing and sent to the participant's last known address.

Q-47: Is there another time when plans must provide notice of the right, described in section

303(e)(1) of REA '84, to elect a pre-REA 1984 qualified joint and survivor annuity?

A-47: Yes. Notice of this right must also be provided to a participant at the time the participant applies for benefit payments.

[53 FR 31842, Aug. 22, 1988; 53 FR 48534, Dec. 1, 1988, as amended by T.D. 8794, 63 FR 70338, Dec. 21, 1998; T.D. 8891, 65 FR 44682, July 19, 2000; T.D. 9099, 68 FR 70144, Dec. 17, 2003]

## 29 U.S.C.A. § 1001

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to

provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of

service, to meet minimum standards of funding, and by requiring plan termination insurance.

## 29 U.S.C.A. § 1055

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that--

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

(b) Applicable plans

(1) This section shall apply to--

(A) any defined benefit plan,

**(B)** any individual account plan which is subject to the funding standards of section 1082 of this title, and

**(C)** any participant under any other individual account plan unless--

**(I)** such plan provides that the participant's nonforfeitable accrued benefit (reduced by any security interest held by the plan by reason of a loan outstanding to such participant) is payable in full, on the death of the participant, to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under subsection (c)(2) of this section, to a designated beneficiary),

**(ii)** such participant does not elect the payment of benefits in the form of a life annuity, and

**(iii)** with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in subparagraph (A) or (B) or to which this clause applied with respect to the participant.

Clause (iii) of subparagraph (C) shall apply only with respect to the transferred assets (and income therefrom) if the plan separately accounts for such assets and any income therefrom.

**(2)(A)** In the case of--

**(I)** a tax credit employee stock ownership plan (as defined in section 409(a) of Title 26), or

**(ii)** an employee stock ownership plan (as defined in section 4975(e)(7) of Title 26),subsection (a) of this section shall not apply to that portion of the employee's accrued benefit to which the requirements of section 409(h) of Title 26 apply.

**(B)** Subparagraph (A) shall not apply with respect to any participant unless the requirements of clause [FN1] (I), (ii), and (iii) of paragraph (1)(C) are met with respect to such participant.

**(4)** [FN2] This section shall not apply to a plan which the Secretary of the Treasury or his delegate has determined is a plan described in section 404(c) of Title 26 (or a continuation thereof) in which participation is substantially limited to individuals

who, before January 1, 1976, ceased employment covered by the plan.

(4) [FN2] A plan shall not be treated as failing to meet the requirements of paragraph (1)(C) or (2) merely because the plan provides that benefits will not be payable to the surviving spouse of the participant unless the participant and such spouse had been married throughout the 1-year period ending on the earlier of the participant's annuity starting date or the date of the participant's death.

(c) Plans meeting requirements of section

(1) A plan meets the requirements of this section only if--

(A) under the plan, each participant--

(I) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both),

(ii) if the participant elects a waiver under clause (I), may elect the qualified optional survivor annuity at any time during the applicable election period, and

(iii) may revoke any such election at any time during the applicable election period, and

(B) the plan meets the requirements of paragraphs (2), (3), and (4).

(2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless--

(A) (I) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or

(B) it is established to the satisfaction of a plan representative that the consent required under

subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.

Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

(3)(A) Each plan shall provide to each participant, within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary of the Treasury may prescribe) a written explanation of--

(I) the terms and conditions of the qualified joint and survivor annuity and of the qualified optional survivor annuity,

(ii) the participant's right to make, and the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,

(iii) the rights of the participant's spouse under paragraph (2), and

**(iv)** the right to make, and the effect of, a revocation of an election under paragraph (1).

**(B)(I)** Each plan shall provide to each participant, within the applicable period with respect to such participant (and consistent with such regulations as the Secretary may prescribe), a written explanation with respect to the qualified preretirement survivor annuity comparable to that required under subparagraph (A).

**(ii)** For purposes of clause (I), the term "applicable period" means, with respect to a participant, whichever of the following periods ends last:

**(I)** The period beginning with the first day of the plan year in which the participant attains age 32 and ending with the close of the plan year preceding the plan year in which the participant attains age 35.

**(II)** A reasonable period after the individual becomes a participant.

**(III)** A reasonable period ending after paragraph (5) ceases to apply to the participant.

**(IV)** A reasonable period ending after this section applies to the participant.

In the case of a participant who separates from service before attaining age 35, the applicable period shall be a reasonable period after separation.

**(4)** Each plan shall provide that, if this section applies to a participant when part or all of the participant's accrued benefit is to be used as security for a loan, no portion of the participant's accrued benefit may be used as security for such loan unless--

**(A)** the spouse of the participant (if any) consents in writing to such use during the 90-day period ending on the date on which the loan is to be so secured, and

**(B)** requirements comparable to the requirements of paragraph (2) are met with respect to such consent.

**(5)(A)** The requirements of this subsection shall not apply with respect to the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit, as the case may be, if such benefit may not be waived (or another

beneficiary selected) and if the plan fully subsidizes the costs of such benefit.

**(B)** For purposes of subparagraph (A), a plan fully subsidizes the costs of a benefit if under the plan the failure to waive such benefit by a participant would not result in a decrease in any plan benefits with respect to such participant and would not result in increased contributions from such participant.

**(6)** If a plan fiduciary acts in accordance with part 4 of this subtitle in--

**(A)** relying on a consent or revocation referred to in paragraph (1)(A), or

**(B)** making a determination under paragraph (2),

then such consent, revocation, or determination shall be treated as valid for purposes of discharging the plan from liability to the extent of payments made pursuant to such Act.

**(7)** For purposes of this subsection, the term "applicable election period" means–

(A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the 180-day period ending on the annuity starting date, or

(B) in the case of an election to waive the qualified preretirement survivor annuity, the period which begins on the first day of the plan year in which the participant attains age 35 and ends on the date of the participant's death.

In the case of a participant who is separated from service, the applicable election period under subparagraph (B) with respect to benefits accrued before the date of such separation from service shall not begin later than such date.

(8) Notwithstanding any other provision of this subsection--

(A)(I) A plan may provide the written explanation described in paragraph (3)(A) after the annuity starting date. In any case to which this subparagraph applies, the applicable election period under paragraph (7) shall not end before the 30th day after the date on which such explanation is provided.

(ii) The Secretary of the Treasury may by regulations limit the application of clause (I), except that such regulations may not limit the period of time by which the annuity starting date precedes the provision of the written explanation other than by providing that the annuity starting date may not be earlier than termination of employment.

(B) A plan may permit a participant to elect (with any applicable spousal consent) to waive any requirement that the written explanation be provided at least 30 days before the annuity starting date (or to waive the 30-day requirement under subparagraph (A)) if the distribution commences more than 7 days after such explanation is provided.

(d)(1) "Qualified joint and survivor annuity" defined

For purposes of this section, the term "qualified joint and survivor annuity" means an annuity--

(A) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is

payable during the joint lives of the participant and the spouse, and

(B) which is the actuarial equivalent of a single annuity for the life of the participant.

Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

(2)(A) For purposes of this section, the term "qualified optional survivor annuity" means an annuity--

(I) for the life of the participant with a survivor annuity for the life of the spouse which is equal to the applicable percentage of the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(ii) which is the actuarial equivalent of a single annuity for the life of the participant.
Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

**(B)(I)** For purposes of subparagraph (a), if the survivor annuity percentage--

**(I)** is less than 75 percent, the applicable percentage is 75 percent, and

**(II)** is greater than or equal to 75 percent, the applicable percentage is 50 percent.

**(ii)** For purposes of clause (I), the term "survivor annuity percentage" means the percentage which the survivor annuity under the plan's qualified joint and survivor annuity bears to the annuity payable during the joint lives of the participant and the spouse.

(e) "Qualified preretirement survivor annuity" defined

For purposes of this section--

**(1)** Except as provided in paragraph (2), the term "qualified preretirement survivor annuity" means a survivor annuity for the life of the surviving spouse of the participant if--

(A) the payments to the surviving spouse under such annuity are not less than the amounts which would be payable as a survivor annuity under the qualified joint and survivor annuity under the plan (or the actuarial equivalent thereof) if--

(I) in the case of a participant who dies after the date on which the participant attained the earliest retirement age, such participant had retired with an immediate qualified joint and survivor annuity on the day before the participant's date of death, or

(ii) in the case of a participant who dies on or before the date on which the participant would have attained the earliest retirement age, such participant had--

(I) separated from service on the date of death,

(II) survived to the earliest retirement age,

(III) retired with an immediate qualified joint and survivor annuity at the earliest retirement age, and

**(IV)** died on the day after the day on which such participant would have attained the earliest retirement age, and

**(B)** under the plan, the earliest period for which the surviving spouse may receive a payment under such annuity is not later than the month in which the participant would have attained the earliest retirement age under the plan.

In the case of an individual who separated from service before the date of such individual's death, subparagraph (A)(ii)(I) shall not apply.

**(2)** In the case of any individual account plan or participant described in subparagraph (B) or (C) of subsection (b)(1) of this section, the term "qualified preretirement survivor annuity" means an annuity for the life of the surviving spouse the actuarial equivalent of which is not less than 50 percent of the portion of the account balance of the participant (as of the date of death) to which the participant had a nonforfeitable right (within the meaning of section 1053 of this title).

(3) For purposes of paragraphs (1) and (2), any security interest held by the plan by reason of a loan outstanding to the participant shall be taken into account in determining the amount of the qualified preretirement survivor annuity.

(f) Marriage requirements for plan

(1) Except as provided in paragraph (2), a plan may provide that a qualified joint and survivor annuity (or a qualified preretirement survivor annuity) will not be provided unless the participant and spouse had been married throughout the 1-year period ending on the earlier of--

(A) the participant's annuity starting date, or

(B) the date of the participant's death.

(2) For purposes of paragraph (1), if--

(A) a participant marries within 1 year before the annuity starting date, and

(B) the participant and the participant's spouse in such marriage have been married for at least a 1-year

period ending on or before the date of the participant's death,

such participant and such spouse shall be treated as having been married throughout the 1-year period ending on the participant's annuity starting date.

(g) Distribution of present value of annuity; written consent; determination of present value

(1) A plan may provide that the present value of a qualified joint and survivor annuity or a qualified preretirement survivor annuity will be immediately distributed if such value does not exceed the amount that can be distributed without the participant's consent under section 1053(e) of this title. No distribution may be made under the preceding sentence after the annuity starting date unless the participant and the spouse of the participant (or where the participant has died, the surviving spouse) consent in writing to such distribution.

(2) If--

(A) the present value of the qualified joint and survivor annuity or the qualified preretirement

survivor annuity exceeds the amount that can be distributed without the participant's consent under section 1053(e) of this title, and

(B) the participant and the spouse of the participant (or where the participant has died, the surviving spouse) consent in writing to the distribution,
the plan may immediately distribute the present value of such annuity.

(3)(A) For purposes of paragraphs (1) and (2), the present value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate.

(B) For purposes of subparagraph (A)--

(I) The term "applicable mortality table" means a mortality table, modified as appropriate by the Secretary of the Treasury, based on the mortality table specified for the plan year under subparagraph (A) of section 1083(h)(3) of this title (without regard to subparagraph (C) or (D) of such section).

(ii) The term "applicable interest rate" means the adjusted first, second, and third segment rates

applied under rules similar to the rules of section 1083(h)(2)(C) of this title for the month before the date of the distribution or such other time as the Secretary of the Treasury may by regulations prescribe.

**(iii)** For purposes of clause (ii), the adjusted first, second, and third segment rates are the first, second, and third segment rates which would be determined under section 1083(h)(2)(C) of this title if--

**(I)** section 1083(h)(2)(D) of this title were applied by substituting the average yields for the month described in clause (ii) for the average yields for the 24-month period described in such section,

**(II)** section 1083(h)(2)(G)(i)(II) of this title were applied by substituting "section 1055(g)(3)(B)(iii)(II) of this title" for "section 1082(b)(5)(B)(ii)(II) of this title", and

**(III)** the applicable percentage under section 1083(h)(2)(G) of this title were determined in accordance with the following table:

| In the case of plan years beginning in: | The applicable percentage is: |
|---|---|
| 2008 | 20 percent |
| 2009 | 40 percent |
| 2010 | 60 percent |
| 2011 | 80 percent. |

(h) Definitions

For purposes of this section--

**(1)** The term "vested participant" means any participant who has a nonforfeitable right (within the meaning of section 1002(19) of this title) to any portion of such participant's accrued benefit.

**(2)(A)** The term "annuity starting date" means–

**(I)** the first day of the first period for which an amount is payable as an annuity, or

**(ii)** in the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred which entitle the participant to such benefit.

**(B)** For purposes of subparagraph (A), the first day of the first period for which a benefit is to be received by reason of disability shall be treated as the annuity starting date only if such benefit is not an auxiliary benefit.

**(3)** The term "earliest retirement age" means the earliest date on which, under the plan, the participant could elect to receive retirement benefits.

(i) Increased costs from providing annuity

A plan may take into account in any equitable manner (as determined by the Secretary of the Treasury) any increased costs resulting from providing a qualified joint or survivor annuity or a qualified preretirement survivor annuity.

(j) Use of participant's accrued benefit as security for loan as not preventing distribution

If the use of any participant's accrued benefit (or any portion thereof) as security for a loan meets the requirements of subsection (c)(4) of this section, nothing in this section shall prevent any distribution

required by reason of a failure to comply with the terms of such loan.

(k) Spousal consent

No consent of a spouse shall be effective for purposes of subsection (g)(1) or (g)(2) of this section (as the case may be) unless requirements comparable to the requirements for spousal consent to an election under subsection (c)(1)(A) of this section are met.

(l) Regulations; consultation of Secretary of the Treasury with Secretary of Labor

In prescribing regulations under this section, the Secretary of the Treasury shall consult with the Secretary of Labor.

## 29 U.S.C.A. § 1133

In accordance with regulations of the Secretary, every employee benefit plan shall--

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

## M.C.L.A. 700.2801

Sec. 2801. (1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(2) For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or live together as husband and wife.

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual.

(c) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

(d) An individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual.

(e) An individual who did any of the following for 1 year or more before the death of the deceased person:

*(i)* Was willfully absent from the decedent spouse.

*(ii)* Deserted the decedent spouse.

*(iii)* Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.

## U.S.C.A. Const. Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.